TRANSCRIPT OF RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1916

No. 9[redacted]413

Frank
FREDERICK W. MERRICK, JOHN W. HARRER AND GRANT FELLOWS,

Appellants,

vs. (Consolidated Cause)

N. W. HALSEY & COMPANY, ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan.

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In the District Court of the United States

EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

No. 131.

N. W. Halsey & Company, Continental & Commercial Trust & Savings Bank; Arthur B. Leach, Ferry W Leach, and George G. Olmstead; Henry L. Higginson, James J. Storrow, George C. Lee, N. Penrose Hallowell, Hugh G. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Frederick W. Allen, David Shaw and A. James Sheldon,

Plaintiffs,

vs.

Frank W. Merrick, John W. Haarer and Grant Fellows,

Defendants.

BILL OF COMPLAINT.

(Filed August 28, 1915.)

To the Honorable, the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division:

N. W. Halsey & Company; Continental & Commercial Trust & Savings Bank; Arthur B. Leach, Ferry W. Leach, and George G. Olmstead; Henry L. Higginson, James J. Storrow, George C. Lee, N. Penrose Hallowell, Hugh G. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Frederick W. Allen, David Shaw and A. James Sheldon bring this, their Bill of Complaint, against Frank W. Merrick, John W. Haarer and Grant Fellows, and thereupon said plaintiffs complain and allege—

1. That said plaintiffs, N. W. Halsey & Company and Continental & Commercial Trust & Savings Bank are and have been for a long time past corporations or-

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That such orders are accepted by your orators in Chicago, Illinois, and the securities so purchased are then forwarded to such purchaser in Michigan from your orators' office in Chicago.

7. That the representations made by your orators as to the stocks, bonds and other securities they sell in Michigan are true representations.

8. That your orators further show that they have been and now are being solicited by various persons, firms and corporations to sell securities as above described in Paragraph Third, in Michigan. That they have contracted to sell certain such securities and the owners or issuers thereof have undertaken and agreed to pay your orators a compensation for such service.

9. That your orators and those who now solicit that they sell such securities in Michigan, and those with whom they have agreements as to the sale of such securities, and the owners of such securities who have committed them to your orators for sale and those to whom they offer their said securities for sale have been informed that the said securities of the kind hereinbefore described in paragraph Third cannot be sold in Michigan unless full compliance is made by the issuer of such securities or the owners thereof, with Act 46 of the Public Acts of 1915 of the State of Michigan, which became effectual upon the 21st day of August, 1915.

10. Your orators further charge that said Act 46 of the Public Acts of 1915 of the Legislature of the State of Michigan is entitled "An Act to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State of Michigan by any dealer, firm, company, association or corporation, foreign or domestic, by requiring an inspection of such stocks, bonds, or other securities and an inspection of the business of such persons, firms, companies, associations or corporations, including dealers and agents, and such regulation and supervision of the business of said persons, firms, companies, associations or corporations, including dealers and agents as may be necessary to prevent fraud in the sale within the State, of any stocks, bonds or other securities, and to provide a penalty for the violation thereof, and to repeal Act No. 143 of the Public Acts of 1913, approved May 2nd, 1913, and all other acts or parts of acts inconsistent herewith," a copy of said Act is hereto attached and marked Exhibit "A," and made a part of this your orators' Bill of Complaint.

11. That said Act 46 of the Public Acts of 1915, purports to create a Commission to be known as the Michigan Securities Commission composed of the Commissioner of the State Banking Department, the State Treasurer and the Attorney General of the State (Section 1), which Commission is by said Act given power, and upon it is imposed the duty to administer and to provide for the enforcement of the provisions of the said Act: that said Act purports to define foreign and domestic investment companies, and to include in such definition every person, corporation, co-partnership, company or association organized under the laws of any state, territory or government, which shall by itself or by or through others sell or negotiate for the sale of any stocks, bonds or other securities, issued by him, it or them within the State of Michigan (Section 2). That said Act does, however, exempt from the provisions certain securities which are listed in detail in Section 3 thereof to which Section reference is hereby made. That the said Michigan Securities Commission created by said Act does, as your orator is informed and believes, construe the said Act to embrace within such definition of said investment companies, any person, corporation or co-partnership, company or association which shall by itself or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, it or them within the State of Michigan and not therein specifically exempted, and does include therein your orator as such an investment company. That said Act does likewise purport to make said Michigan Securities Commission the successor of the Michigan Securities Commission created by Act 143 of the Public Acts of 1913, and provides that all proceedings pending before said last named commission and all acts both civil and criminal pending under said Act shall be confined and completed under said Act 43 of the Public Acts of 1915.

12. That said Act likewise does provide that before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner whatever in this State any stocks, bonds or other securities of its own issue, the investment company, whether domestic or foreign, shall file with the Michigan Securities Commission certain statements and documents specifically provided for, and described in Section 4 of said Act, which statements and documents shall be authenticated as therein provided, and shall contain a statement showing in full detail the plan upon which it proposes to transact busi-

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ness, such itemized accounts of its financial condition and assets and liabilities, and such information as to its business and affairs as is required by said Act including a copy of its prospectus and proposed advertisements. That the said Act likewise provides for the payment of certain fees to the said Michigan Securities Commission, likewise to be paid before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner any such stocks, bonds or other securities.

13. That the said Act likewise provides, that also, before offering for sale any of such stocks, bonds or other securities within the State of Michigan, the Company so offering same for sale shall file its irrevocable consent that suits and actions may be commenced against it in the court of any county in such State of Michigan where a cause of action may arise or in which the plaintiff may reside by service of any process or pleading authorized by the laws of Michigan on the Commissioner of the State Banking Department (Section 6).

14. That said Act further provides in Section 7 thereof that application of such investment company shall be heard by the Commission at its next regular monthly meeting, providing that the filing of such application shall precede such meeting by 24 hours, or at an adjourned or special meeting on 2 days notice to the applicant.

15. That said Act likewise provides that said Commission may demand from such investment company any further information which may be necessary to enable the Commission to pass on the questions which may come before it. That said Commission may cause an appraisal to be made of the property of said investment company (Section 8) and may fix the amount of stocks, bonds and securities which shall be issued by any corporation, foreign or domestic, in payment of property, patents, goodwill, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued shall be deposited in escrow under such terms as the Commission shall prescribe. That it likewise provides that said commission may withhold the license of such corporation to sell such stocks and securities if said corporation has issued securities in payment for property, patents, good-will, promotion and intangible assets in excess of the value fixed by the Commission or if such securities are not deposited in escrow as required by the Commission, until such securities in excess of the value found by the Commission

have been surrendered to the Corporation and cancelled by it and until the stock has been deposited in escrow as prescribed by the Commission.

16. That said Act does further provide, in Section 9 thereof, that upon the filing of said statements and documents with the said Michigan Securities Commission, as provided in the preceding Sections of said Act, and upon an examination by the Commission of the business and affairs of the Company, and upon the filing of such statements and documents which the aforesaid Commission shall deem it advisable to have filed, the said Commission shall examine such statements and the results of such investigation and if, after such examination, as in said Act provided, said Commission shall find that the proposed plan of business or its proposed contracts, stocks, bonds or other securities are fraudulent, or that its proposed contracts, stocks, bonds or other securities are of such a nature that the sale of said contracts, stocks or bonds or other securities would, in the opinion of the Commission, work a fraud upon the purchaser thereof, then the said Michigan Securities Commission shall disapprove the sale of such contracts, stocks, bonds or other securities and shall notify said company by registered mail, of its findings and disapproval, and it shall be unlawful for said company to do any business in the way of selling or offering for sale such securities within said state. That however if the said Commission shall not find that the proposed plan of said investment company or its proposed securities are fraudulent or are of such a nature that their sale would, in the opinion of the Commission, work a fraud on the purchaser, then it shall approve the sale of such stocks and shall issue a certificate in the form prescribed by the statute.

17. Said Act likewise provides among other things, and particularly in Section 10 thereof, that any person, corporation or co-partnership which is not the issuer of such securities but which shall in this state sell or offer for sale any of the securities of any investment company as in said Act defined, except such securities as are specifically exempted in the Act or which shall by advertisement or otherwise profess to engage in the business of selling or offering for sale, such securities shall be deemed to be a "dealer" in such securities and that no such dealer shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities unless he shall have filed a list of same with the Commission.

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It further provides that the term "dealer" shall not include the owner of such securities who sells securities owned by him when such sale is not in the course of continued and successive transactions of a similar nature. Nor shall it include one who, in a trust capacity created by law, lawfully sells any securities embraced in said trust.

It further provides that any dealer desiring to sell the securities of an investment company shall register both himself and his agents with the sale Commission, furnish it certain information required by it and pay to it certain fees both for said dealer and any agents thereof (Section 11).

That if said dealer shall be a non-resident of the State he shall file an irrevocable appointment of the Commissioner of the State Banking Department of Michigan as his or its agent in Michigan for the service of process.

Said act further provides as to said dealers by Section 15 thereof that no dealer, as defined by the Act, shall sell or offer for sale any securities unless the provisions of the Act shall have been complied with as to such securities nor until he shall have registered with the Commission; such dealer, if the investment company issuing the securities which the dealer desires to sell, has not itself complied with the Act may make application to the Commission for license to sell all said securities in the manner provided for applications by the investment company.

18. Said Act likewise provides in Section 13 thereof that the general accounts of every investment company as defined in said Act shall be kept in sufficient detail that the Commission can ascertain at any time its financial condition and that such books of account at all times during business hours except on Sundays and Holidays shall be open to stockholders and investors in said Company and the said Commission and its representatives.

19. Said Act likewise provides that all such investment companies as therein defined shall be subject to examination by the Commission or any member thereof at any time said Commission shall deem it advisable and shall pay a fee for such examination, and the expenses of such examiners; and that their failure to pay such fee shall forfeit their right to sell their securities within the State of Michigan.

That if upon any such examination it shall be made to appear to said Commission that further sale of the securities of such company would work a fraud on the purchaser, then the Commission may revoke the license of said investment company, on notice duly given and hearing had, and may, pending such hearing, suspend the right to sell such securities.

20. That the said Act provides in Section 14 thereof, that it shall be unlawful for any such investment company or dealer or representative thereof either directly or indirectly to sell or offer for sale or take subscriptions for or negotiate for the sale in any manner of such stocks, bonds, or other securities except as in said Act exempted unless and until the said Commission has approved same and issued its certificate of such approval. That said Act likewise provides that it shall be unlawful for any such investment company to transact business on any other plan than is set forth in the statements and papers required to be filed by said Act. That said Act likewise provides that it shall be unlawful for any investment company or dealer to issue; circulate or deliver any prospectus or advertisement differing from the copy filed with the Commission. That said Act likewise makes it unlawful for any newspaper to advertise the sale of any stocks, bonds or securities not approved by the Commission and not exempt under the Act.

21. Said Act also provides in Section 16 thereof that all the information obtained by the Commission with reference to such security, and all its records in reference thereto shall be open to the public and that it may from time to time issue, in pamphlet form or in newspaper advertisements, or otherwise, such information as it deems would be of public interest with reference to the securities sold or offered for sale within the State.

22. Said Act likewise provides in Section 17 thereof that it shall not be construed to repeal or modify any laws giving the State Banking Department control and supervision over State banks and the business of banking or the Commissioner of Insurance control and supervision over the business of insurance in this State.

23. Said Act likewise provides in Section 19 thereof, that any person who shall knowingly or willfully subscribe to or make or cause to be made any false statement or false entry in any book of any investment company with the intention or for the purpose of deceiving any person authorized to examine the affairs of such company or shall make or publish any false statement of

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and penalties to the Commission and to the publishers of the manual.

30. That said defendants have likewise issued certain blanks upon which are to be made the statements required from "investment companies" as defined by said Act as a condition precedent under said Act before the stocks, bonds and other securities of such company can be sold or offered for sale in Michigan. That a copy of such blank is attached hereto and marked Exhibit "B." That it is the blank which such investment company is required to fill out and the statement which it is required to make in order that it may sell or offer for sale its stocks bonds and other securities in Michigan, either through itself or its agent and in order that others may sell such securities in Michigan.

31. That said blank requires that said investment companies furnish information which is unreasonable, not pertinent to the purpose for which said statement is required under the Act and substantially impossible to furnish.

(a) Said blank requires a statement of the consideration paid for stocks and bonds whereas as to the unissued preferred stocks and bonds of investment companies no consideration has yet been paid.

(b) It requires a true and complete list of the holders of the securities of said investment companies whereas such list is constantly changing and cannot be truly and completely made.

(c) It requires a profit and loss statement which is not in conformity with the account upon its books and which cannot be made in the manner required in the blank from the books of said investment companies.

(d) It requires a true and complete statement of its receipts and disbursements for the past six or twelve months whereas such a statement would be cumbersome in the extreme, and would convey no information to said defendants pertinent to said purpose expressed in said Act.

(e) It requires a list of it officers, together with their holdings of stock and bonds in said investment companies, the actual cash invested, their estimated net worth and the time devoted to the Company whereas the number of shares and bonds owned is a matter confidential to said officers which said investment company has no right to divulge, nor has said company accurate information thereof: nor has said company any way in which to determine the actual cash invested by such officers in said

company; nor the estimated worth of its said officers. And your orators charge that all such information is not pertinent to the purpose of said Act and beyond the power of said defendants to require.

(f) It requires certain reference as to the character, responsibility and financial standing of each director of said company whereas the giving of such reference is not pertinent in any way to the purposes of said Act and beyond the power of said defendants to require.

32. That by reason of the requirements of said defendants as to said statement which must be filed by said investment company before it can sell or offer to sell its securities in Michigan, either by itself or through your orators, the property rights of your orators are invaded and destroyed and their freedom of contract curtailed, impaired and destroyed and they will be otherwise seriously damaged in their business and property.

33. That by reason of the enforcement of said law and the requirements of said defendants and the requirements of said statements so to be filed, your orators cannot sell or offer to sell within the State of Michigan, its said stocks, bonds and other securities, both certain of those they now own and those they have contracted to sell.

34. That said defendants have likewise caused to be issued their so-called Form No. S, "Dealers" Application, a copy of which is hereto attached and marked Exhibit "D," and publicly declared that all dealers, including your orators, in securities of investment companies, must file such application properly filled out before selling or offering such securities for sale in Michigan or professing to engage or engaging in said business therein. That said blank requires that such dealers and your orators furnish information which is unreasonable, and not pertinent to the purpose for which said statement is required.

(a) Said blank requires the statement of the number of shares of any stockholder in a dealer corporation, whereas such information is not pertinent and does not relate to the purpose for which the statement is required.

(b) Said blank requires the further filing of the appointment by said dealer, whether partnership or corporation, of an agent for service of process—whereas such requirement is invalid as to your orators.

That, even if your orators did comply with said requirements of the said Act and of the said defendants,

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your orators would be, by said Act, deprived of the right to sell their stocks, bonds and other securities in Michigan for a period of not less than 24 hours and for a much longer period unless their said application should be filed 24 hours before the regular meeting of said Commission after the furnishing of such statement and the compliance by your orators with said Act.

That the first regular meeting of said Commission will be held on Friday the 3rd day of September, 1915, and unless said Commission should hold a special meeting your orators would be deprived of the right to sell its stock from the date of this your orators bill of complaint to said third day of September, 1915.

35. That not only are your orators deprived of their right to sell such securities in Michigan but the investment company which issues said securities is likewise deprived of said right and owners thereof are also deprived of the right to sell same through brokers and dealers and through your orators except in compliance with the terms of said Act and requirement of said defendants.

36. That by reason of the heavy penalties in said Act set forth, brokers and dealers in the said securities and in similar securities fear to sell same or offer same for sale in Michigan, and your orators and said investment companies are deprived of the power to sell same in Michigan in any way whatsoever.

37. That the right to sell stocks and bonds and securities is a valuable right to said investment companies and to your orators. That in many cases the proceeds thereof are required to properly extend and carry on the business of said companies. That to deny to said companies the right to sell same in Michigan endangers their business and threatens to cause said companies serious damage and loss.

38. That the present owners of the securities of your orator acquired the same with the right to dispose of same in Michigan and elsewhere and free from any restrictions such as are imposed by said Act and any such restriction impair the said right and damage said owners and your orators.

39. Your orators show that they are each and all plaintiffs in a certain action brought in this court by a bill of complaint filed July 21, 1913, against Edward H. Doyle, John W. Haarer and Grant Fellows, which cause is known as Equity Cause No. 33. That in said bill of complaint said plaintiffs complained of the certain Act

143 of the Public Acts of 1913, the so-called Michigan Blue Sky Act of 1913, and charged said Act to be unconstitutional as in said bill of complaint more fully appears. That a preliminary injunction was prayed for by said plaintiffs and upon the hearing and consideration thereof the court rendered an opinion thereon declaring said Act unconstitutional and void, which said opinion is set forth and published in 210 Federal Reporter, 173. That thereafter a final decree was rendered in said cause in accord with said opinion and a permanent injunction issued against the enforcement of said Act by said defendants. That said Act 46 of the Public Acts of 1915, is substantially a re-enactment of Act 143 of the Public Acts of 1913. That its purpose and effect is simply to amend the Act of 1913. That while it, in terms, purports to repeal said 1913 Act, it creates a Commission with powers substantially identical with those of the 1913 Commission designed to regulate investment companies and their securities and dealers therein; all as in said Act 143 defined. That said 1915 Act provides for the preservation and continuance of the proceedings pending under the 1913 Act. That it is in effect an attempt to preserve said Commission of 1913 with all its powers, duties and proceedings though that Commission and that law had by this court been declared inoperative, void and invalid. That your orators being the plaintiffs at whose suit said former decree had been entered are entitled in this suit to the same relief as if they had in said former action petitioned the court for further relief therein and for the extension of the injunction therein issued against the said Michigan Securities Commission and the defendants herein attempting in any way to enforce said Act 46 of the Public Acts of 1915.

Your orators in this connection refer to the records and files in said Cause No. 33 and make them a part of this bill not, however, setting same out here at length.

40. Your orators charge that said Act 46 Public Acts of 1915, is unconstitutional and void and of no effect and is in violation of Section 21 of Article five of the Constitution of the State of Michigan which provides that no law shall embrace more than one object which shall be expressed in its title:

(a) In that the title of said Act includes as one object the prevention of fraud in the sale and disposition of stocks, bonds and other securities and likewise embraces a second object an inspection of the business of

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persons, firms, companies, associations selling or offering for sale such stocks, bonds and other securities.

(b) In that said Act in the title thereof, provides for the regulation of investment companies. That the Act itself provides for the regulation of manufacturing, transportation, mining and various other companies; that the title of said Act does not therefore express its object.

(c) In that said Act provides in Section 14 thereof that it shall be unlawful for any newspaper published in the State of Michigan to advertise the sale of any stocks, bonds or other securities which have not been approved by the Commission, or which are not exempt under the provisions of this Act. That said provision is not expressed in the title of said Act.

(d) In that the said Act forbids the taking of subscriptions for stock of corporations but such object is not set forth in its title.

(e) In that said act in the title thereof is entitled an act to prevent fraud, etc., and to provide for an inspection regulation and supervision of investment companies as there defined as may be necessary to prevent fraud. That said act in so far as it provides that the Commission may fix the amount of stock which a corporation may issue for property sets forth an object which is not expressed in its title.

41. Said Act is likewise unconstitutional and void and in violation of the 14th Amendment of the Federal Constitution which provides that no state shall make or enforce any laws which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any personal equal protection of the law.

(a) Since said Act by its terms is applicable to stocks, bonds and other securities but is not applicable to unsecured commercial paper.

(b) Since said Act is by its terms applicable to secured commercial paper but is not applicable to unsecured commercial paper.

(c) Since said Act by its terms is not applicable to securities of state and national banks and trust companies but is applicable to banks other than state or national.

(d) Since said Act by its terms is not made applicable to building and loan associations but is applicable to other corporations incorporated to own, improve and deal in real property.

(e) Since said Act by its terms is made applicable to mortgage securities upon real property situated without the State of Michigan where the entire mortgage is sold and transferred with the notes secured by said mortgage, but said Act is not made applicable to mortgages upon real property situated within the State of Michigan, where the entire mortgage is sold and transferred with the notes secured by said mortgage.

(f) Since said Act by its terms is not applicable to mortgages upon real property situated within this state where the entire mortgage is sold and transferred with the notes secured by the mortgage, but is applicable to a mortgage on property within this state if said mortgage secures bonds and the entire mortgage is sold with all said bonds, or if said mortgage secures a note or notes and the entire mortgage is not sold with the note or notes.

(g) Since the said Act by its terms is made applicable to the stocks of investment companies as defined in said Act when the said stocks are sold by such companies or by agents thereof, but is not made applicable to the stock which is issued by such corporations and sold to its stockholders or to stock dividends.

(h) Since the Act by its terms forbids the taking subscriptions for stocks but does not forbid the sale of an increase of stock to those who are already stockholders.

(i) Since said Act, by its terms, is made applicable to the stock of any said investment company as defined in said Act when said stock is sold by said investment company or by its agents but is not made applicable to the stock of said Company when the same is issued to an original subscriber thereto.

(j) Since said Act is made applicable to investment companies as defined in said act when said investment companies sell or offer for sale an entire issue of its bonds, stocks or other securities when such sale or offer for sale is not made in course of continued and successive transactions of similar nature, but said Act is not made applicable to the sale of such stocks, bonds or other securities by the owner thereof when he sells such securities owned by him when such sale is not made in the course of continued and successive transactions of a similar nature.

(k) Since said Act is made applicable to the dealer, as therein defined, in stocks, bonds and other securities but is not made applicable to one who in a trust capacity

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created by law, lawfully sells any securities embraced in such trust.

(l) Since such Act is not applicable to securities which are listed in any standard manual of information approved by the Commission and it is applicable to securities not so listed, though the listing of such securities in such manual is not a finding as to their fraudulent character or whether or not their sale would work a fraud on the purchaser.

(m) Since said Act provides that the said Commission may appraise the property of a corporation and fix the amount of stock which may be issued thereof but does not provide that it may appraise the property of any other form of investment company nor fix the amount of securities other than stock which may be issued for property either of a corporation or of any other form of investment company as in said act defined.

42. That said Act 143 is unconstitutional and void and is in violation of Section 8 of Article 1 of the Constitution of the United States and of the 14th Amendment of said Constitution of the United States in that said Act does impose a burden upon interstate commerce in the following particulars:

(a) Said Act forbids the sale or attempt to sell of any stocks, bonds or other securities of any investment company, as defined in said Act, for a definite period of not less than 24 hours from and after the date on which said investment company shall have filed in the office of the Michigan Securities Commission, the statement and information required by said Act, and shall have otherwise conformed to said Act.

(b) Since said Act does prohibit the sale of stock, bonds and other securities of said investment companies in the State of Michigan unless said investment companies shall in all respects conform to the requirements of said Act.

(c) Said Act does forbid the sale or offer for sale or the taking of subscriptions for or negotiating for the sale in any manner of the stocks, bonds or other securities of said investment companies as defined in the Act until such investment companies, though they be persons or co-partnerships resident in and organized under the laws of another state or country and non-resident or not organized under the laws of the State of Michigan, shall have filed with the said Michigan Securities Commission the report and information required by said Act and

by said Commission, paid the fees in said Act prescribed and otherwise conformed thereto.

(d) Said Act does compel any person, firm, co-partnership, corporation or association not resident in Michigan, who shall there sell or offer for sale any securities of any investment company covered by said Act or who shall "by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities" to make reports to said Securities Commission and pay certain fees. It forbids such persons, firms, co-partnerships, corporations or association under heavy penalties from selling securities unless they shall have in all respects complied with the law. It also forbids such sale or offer for sale within the State of Michigan whether the same be interstate or intrastate commerce.

In this respect your orators charge that stocks, bonds and other securities sold and offered for sale by your orators are legitimate articles of commerce and that the sale thereof in interstate commerce is not subject to regulation by the State of Michigan in any way whatsoever, and that the sale thereof by your orators to residents of the State of Michigan to be delivered in the State of Michigan, payment therefor to be made upon such delivery to your orators outside the State of Michigan is interstate commerce and the burdens and restrictions imposed on such sale are burdens upon interstate commerce and unreasonable burdens thereon and render said Act unconstitutional and void.

(e) Said Act purports to give the Commission power to appraise the property of a foreign investment company and to examine its affairs and to fix the amount of securities to be issued by any foreign corporation in payment for property and require the stocks and securities so issued for such property to be deposited in escrow on such terms as the Commission may require—such provisions or restrictions and burdens on interstate commerce and unreasonable restrictions and burdens thereon and so render the Act void and of no effect.

(f) Said Act likewise purports to empower said commission after the appraisal described in the last paragraph above to withhold its license to the said corporation to sell such stocks and bonds and securities as it may have issued in payment for property in excess of the value of such property as found by the commission unless or until the said securities are deposited in escrow on terms prescribed by the commission or unless the said excess amount thereof be surrendered to the corporation

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and cancelled by it. Said provisions are unreasonable burdens and restrictions on interstate commerce and render the said Act unconstitutional and void.

43. The said Act is likewise unconstitutional and void and in violation of the Fourteenth Amendment of the Constitution of the United States, since by its restrictions and regulations it deprives your orators and other persons similarly situated, of their property without due process of law, and denies to your orators and other persons similarly situated the equal protection of the laws, and denies to your orators and others the freedom of contract guaranteed by the said constitution.

(a) In that the said Act deprives your orators of the right to sell their securities in the State of Michigan unless the said securities commission determines, in its opinion, that said securities are not fraudulent or that the sale thereof will not work a fraud.

(b) In that the Act deprives your orators and other persons of the right of selling securities, except those exempted by the Act, until they have listed such securities with said commission and paid certain fees and secured the approval of the commission thereon.

(c) In that the said Act deprives your orators and any investment company as defined in said Act of the right to sell their or its stocks, bonds or other securities for a definite period of not less than 24 hours even though said investment company should conform in all respects to the requirements of said law.

(d) And it likewise denies the right of your orators and any investment company as defined in said Act from selling or disposing of its stocks, bonds or any security unless the said Commission shall be of the opinion that the sale of said stocks, bonds or other securities will not work a fraud on the purchaser—though in fact said stocks, bonds or other securities are not fraudulent and the sale thereof is without misrepresentation or fraud.

(e) That it likewise denies to your orators and to any investment company as therein defined the right to sell, and to any person, the right to purchase of your orators or of any such investment company, any of the stocks, bonds or other securities not exempted by the Act if said purchase will in the opinion of the Securities Commission work a fraud on the purchaser, irrespective of the price at which said securities shall be sold and irrespective of the probability that such purchase may result in profit to said purchaser.

(f) It denies to your orators and to any said "investment company" the right to sell any such stocks, bonds or other securities if same will in the opinion of the commission work a fraud upon the purchaser even though such "investment company" or your orators shall sell same without misrepresentation and after having truthfully set forth all the facts in relation thereto to the purchaser thereof.

44. That said Act is likewise unconstitutional and void and in violation of Section 16 of Article II of the Michigan Constitution and of the Fourteenth Amendment of the Constitution of the United States since it does deprive your orators and persons similarly situated of their property without due process of law; inasmuch as the restrictions and conditions prescribed by the Act are not within any power of the State of Michigan to impose and are not within the police power of the said State, in this respect:

(a) That said restrictions and conditions imposed by said Act are not necessary to protect the health, safety, morals and welfare of the people of the State of Michigan.

(b) That such conditions and restrictions as are by said Act imposed are not reasonable to protect the health, safety, morals and essential welfare of the said people of the State of Michigan, since such restrictions and regulations are imposed upon the business of selling all securities of every kind except as exempted in said Act and will seriously impede business and commerce and seriously interfere with business and commerce of every kind whatsoever by preventing the free purchase of said securities and the free investment in the stocks and bonds and securities covered by the Act.

45. That the provisions in said Act in Section 8 thereof is likewise unconstitutional and void.

(a) Said section provides that said commission may cause an appraisal to be made of any investment company seeking to come under the Act and may fix the amount of stocks bonds and securities that shall be issued by such corporation in payment of such property at the value it shall so appraise said property and may require such stocks and securities to be deposited in escrow on such terms as it may prescribe. It may likewise withhold its license to said corporation to sell such securities unless said securities which may have been issued in excess of the value fixed by the commission shall be either surrendered to said corporation or cancelled by

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it or deposited in escrow as the commission shall prescribe.

The aforesaid provision is in absolute prohibition of the sale of stock paid for in property unless the commission approves the value of said property as equal to the par of the stock issued therefor.

The said prohibition of such sale is not based on fraud in said stock or the fraudulent character thereof or fraud in the sale thereof, but upon the opinion of the commission as to the value of the property for which it is issued.

The test to be applied by the commission is not fraud or the probability of fraud, but the probability of loss.

The said provision contravenes the Fourteenth Amendment of the Constitution of the United States and the 16th Section of the Constitution of Michigan.

(b) That said Act is likewise unconstitutional and void and in violation of the 14th Amendment of the Constitution of the United States in that it provides that the said commission may cause an appraisal to be made at the expense of the investment company of its property and may fix the amount of stocks, bonds and other securities which may be issued by said investment company, foreign or domestic, for such property and may require such securities to be deposited in escrow under such terms as it may prescribe and may withhold the license to sell such securities if said company has issued same in excess of the value of said property as fixed by the commission unless said securities shall be surrendered and cancelled or deposited in escrow under the terms prescribed by the said commission.

Your orators charge that the making of such appraisal constitutes a taking of property without due process of law. That the investment companies as described in said Act have acquired in their charters the right to issue securities to the amount there set forth and the requirement that said stock be delivered up and cancelled or placed in escrow is likewise a taking of property without due process of law.

They show that the right to dispose of stocks and securities paid for in property as provided in the statutes and set forth in the charter of said investment companies is a right which cannot be abridged by a requirement that such stocks or securities shall be surrendered or deposited in escrow at the will of or upon the terms prescribed by the commission.

46. That said Act is likewise unconstitutional and void and in violation of Section 16, Article II of the Michigan Constitution and of the Fourteenth Amendment to the Constitution of the United States.

(a) Since said Act purports to regulate and restrict the right of the corporations, co-partnerships, associations, persons and firms who by said Act are defined as "dealers" and provides that the said dealers shall not sell nor offer for sale any securities nor profess the business of selling or offering for sale any securities covered by the Act unless such dealers shall have otherwise complied with the requirements of said Act; that insofar as said Act attempts to classify and define said dealers in said securities it is unconstitutional and void, inasmuch as it denies to said dealers as therein defined the equal protection of the law; that in defining and classifying those who sell or offer for sale any of the stocks, bonds or securities issued by investment companies as defined in the Act, said classification is unreasonable, invalid and void.

(b) Since said Act purports to prohibit any "dealers" as therein defined from selling or offering for sale any stocks, bonds or other securities covered by said Act unless said dealers shall furnish the said commission a statement as to their names and addresses, the general character of the securities to be dealt in by them, the place of their office in Michigan; and such additional information as the commission may deem necessary and that such dealer shall likewise file with said securities commission an appointment of the commissioner of the State Banking Department as his agent in Michigan for the service of process.

47. Said Act is likewise unconstitutional and void and in violation of the Constitution of the State of Michigan and of the Constitution of the United States in that the powers and duties conferred upon the said Michigan Securities Commission involve the delegation of legislative power to the said commission. Said Act confers upon the said commission the power to determine whether the proposed plan of business or the proposed stocks, bonds, and other securities of the said investment companies or of your said orators is or is not fraudulent. It likewise confers upon the said commission power to determine whether the sale of said contracts and securities of your orators as a said investment company would "in the opinion of said commission" work a fraud on the purchaser thereof.

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That the said Act in no respect determines the standard of what is or is not fraudulent and in no respect determines what securities would be fraudulent and in no respect determines what would be the nature and character of securities the sale of which would in the opinion of said commission work a fraud.

But said Act on the other hand confers upon the commission the power to fix, by its opinion, what is or is not fraudulent.

Insofar as said Act does not determine the standard by which said plan of business and said securities are in this respect to be adjudged, it is a delegation of a legislative power, and therefore, void.

48. That the said Act is likewise unconstitutional and void and in violation of the Constitution of the United States and of the State of Michigan, inasmuch as it confers upon the said Michigan Securities Commission the authority and power to determine what is a fraudulent plan of business, a "fraudulent security" and a security the sale of which will work a fraud." That thereby it confers upon said commission judicial authority; that said commission is not a judicial body, within the provisions of the Constitution of the State of Michigan and of the United States, and the delegation thereto of judicial power to determine the questions as above set forth is in violation of said Constitution and the said Act, therefore is void.

49. That the said Act is likewise unconstitutional and void and in violation of the 14th Amendment to the Constitution of the United States in that it denies to your orators and to investment companies made by its terms subject thereto, the right to a judicial investigation by due process of law of the facts as to whether or not the plan of business of any investment company is or is not fraudulent; as to whether or not the securities issued thereby are or are not fraudulent, or whether such securities are or are not of such a nature that their sale will work a fraud upon the purchaser.

50. That said Act is likewise unconstitutional and void, in that it denies the due process of law guaranteed by the Constitution of the United States to your orators and to said investment companies in that the determination of the said commission upon the question as to whether or not the plan of said investment company is fraudulent and whether its securities are fraudulent, or that they will in all probability work a fraud upon the purchaser thereof is final; and that the said Act does

not provide an appeal from the said finding and decision of the said commission. That it provides for a review of such findings by certiorari only. That the said Act does in effect provide that the commission shall conclusively determine the questions of fact which may be submitted to it in the course of investigation of the said plan of the business of said investment company and of its securities.

51. That said Act is likewise unconstitutional and void and in violation of the 14th amendment of the Constitution of the United States in that it deprives your orators and investment companies and others similarly situated of liberty and property without the due process of law and denies to your orators and said investment companies and others equal protection of the law, since said Act provides that said defendants and the Michigan Securities Commission, its clerks, accountants and examiners may examine the business of said investment companies and their accounts, may require them to divulge any and all facts in connection with said business whether or not the same relates in any way to the securities proposed to be sold in Michigan.

Your orators show that said defendants have announced what facts and information in connection with said business the said commission would require in its preliminary statement upon which the securities of said investment companies and others similarly situated will or will not be listed by said commission and that many of such facts of such information do not relate to the question of whether or not such securities are fraudulent or as to whether their sale would work a fraud. Nevertheless said Act does further provide that all such information obtained by said commission and all the records of the commission in regard thereto shall be open to examination by the public.

Whereas your orators charge that their information as to the said business of said investment companies their contracts with their employees and with others, their knowledge as to the methods by which they transact their affairs, their knowledge as to the credits of their customers, their general information as to the conduct of their business, the prices and the costs of the products which they sell each and all are property rights of value to said investment companies and the publication of information thereto as to said business deprives them of valuable rights, seriously damages them in their business and will otherwise cause them damage and loss.

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52. That said Act is likewise unconstitutional and void in that it subjects your orators and investment companies and others similarly situated to cruel and unusual punishments in violation of Article 8 of the Constitution of the State of Michigan in that it prescribes as penalty for the sale or offer for sale of any of the stocks, bonds or other securities of investment companies, unless said companies shall have complied with the provisions of the Act and unless your orator and the dealers described in said Act shall have registered with the commission as prescribed and provided and provides that the said violation of the Act in that respect shall be a misdemeanor and any person who has so violated said Act shall upon conviction thereof be fined not more than $1000.00 or imprisoned in the county jail for not more than one year or both and any intention to defraud any purchaser of stocks bonds or other securities or any intention to wilfully violate said Act is not required to make said violation a misdemeanor.

That any person who shall knowingly or wilfully make or cause to be made any false statements or false entries in the books of the company shall likewise be guilty of a felony and any person who shall exhibit any false paper with the intention of or for the purpose of deceiving any person authorized to investigate said investment company's affairs or who shall make any false statements relative to the securities of same shall likewise be guilty of a misdemeanor and upon conviction shall be fined not more than $1,000 or imprisoned in the county jail for not more than one year, or both. That by the statute of the State of Michigan, making false statements in reference to the condition of any corporation is already made a crime and made punishable under the law of said state by heavy penalties.

53. That said Act is likewise unconstitutional and void, since it prescribes extraordinary and unusual punishment and penalties for violation thereof, and provides penalties of fines or imprisonment in the county jail for the sale or offer for sale of any of the securities covered by said Act, and provides other penalties, fines and imprisonments, all of which are so extreme and cumulative that they prevent any person, firm or corporation, as described in said Act, or a dealer as therein described, from challenging the validity of said Act in the courts, and necessarily constrain all persons to submit to the provisions of said Act rather than take the chance of the penalties imposed. That therefore said Act in that

respect deprives your orators and other persons similarly situated of the equal protection of the law guaranteed to it by the Constitution of the United States.

54. Your orators further charge that said Act declares that all proceedings pending before the Michigan Securities Commission created by Act 143 of the Public Acts of 1913 shall be continued by said Act 46 of 1915, and all actions civil and criminal pending under said Act 143 of 1913 shall be continued and completed under said Act 46.

Your orator charges, however, that said Act 143 of the Public Acts of 1913 has been declared and decreed to be unconstitutional and void by the District Court of the United States for the Eastern District of Michigan in a suit entitled the Alabama and New Orleans Transportation Company et al. vs. Edward J. Doyle et al., being Equity Cause No. 33, on the docket of said court. That the opinion in said cause is reported in 210 Federal Reporter, 173. All of which records and files and said opinion are as hereinbefore set forth and made a part of this bill of complaint. That by said decree said Act 143 of 1913 was declared null and void and of no effect whatsoever. That the said Michigan Securities Commission created by said Act 143, have no valid constitutional authority either as to investment companies as there defined resident in Michigan or as to non-resident investment companies or as to dealers as defined in said Act or as to your orators—and any pretended authority of any kind in said Commission is contrary to law. The proceedings of said former commission cannot therefore be continued or the actions brought under said former Act completed. And said Act 46 of 1915 insofar as it attempts to validate such void and invalid proceedings and acts of said former commission is now of no effect whatsoever.

55. Your orators charge that it is their desire and right to offer their stock, bonds and other securities for sale in the State of Michigan by themselves or through brokers and that it is the avowed purpose of the said defendants herein to prevent such sale and offer for sale unless your orators and such other persons shall have complied in all respects to the requirements of said Act and the requirements of said defendants.

56. That immediate and irreparable injury will be caused to your orators by reason of the enforcement of said Act and particularly by the fact that your orators, their agents and employees will be prevented by said Act from selling the said securities in Michigan except

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in compliance with said Act and not at all for at least 24 hours after listing same as provided in said Act.

57. That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the conduct of said defendants in the enforcement made by said defendants and the Michigan Securities Commission and to prevent a multiplicity of suits against your orators, their officers, agents and employees, brokers and dealers in said securities and owners of said securities, desiring and intending to offer same for sale through dealers and agents and against investment companies desiring to sell their securities and investment companies whose securities your orators desire to sell and that to prevent prosecution under said Act and the imposition of the heavy penalties described by the Act and to prevent such injury to persons intending and desiring to purchase such securities, a writ of injunction is necessary to restrain the said defendants from interfering with your orators and other persons similarly situated and agents and employees of your orators, dealers in said stocks, bonds and other securities and any and all persons, owners of said securities, who may desire to sell same in a manner not permitted by said Act.

58. That the value of the matters herein disputed, the loss which each of your orators are sustaining and will sustain by the enforcement of said Act and the damage to each of your orators' businesses as hereinbefore set forth will be to greatly exceed the sum of five thousand dollars, exclusive of interest and costs.

59. Forasmuch, therefore, as your orators have no remedy in the premises save in a Court of Equity, your orators pray the aid of the court:

(a) To the end that the said Frank W. Merrick, John W. Haarer, and Grant Fellows, defendants herein, may without oath (answer on oath being expressly waived), full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged.

(b) And to the end that said Act 46 of the Public Acts of 1915 may be decreed to be unconstitutional and void and of no effect whatsoever.

(c) And to the end that your orators and their agents, employees and brokers and the dealers in said stocks, bonds and other securities may be decreed to have the right to sell and offer for sale the said stocks, bonds and other securities, without compliance in any way with the regulations and restrictions in said Act set forth.

(d) And that your orators, their officers, agents and employees and those who may sell or offer for sale or profess to sell said stocks, bonds and other securities of your orators, may be secured against unlawful and illegal trespasses and arrests by reason of any alleged violation of said Act.

And that the said Frank W. Merrick, John W. Haarer and Grant Fellows, their agents and employees of every kind whatsoever and the agents and employees of said Michigan Securities Commission may be perpetually and forever restrained by the order and injunction of this court from:

(a) Enforcing and attempting to enforce any of the provisions of said Act 46 of the Public Acts of 1915 and

(b) From hindering or in any way whatsoever attempting to hinder the sale or offer for sale of the stocks, bonds and securities of your orators whether such sale or offer for sale be made by your orators or by any other person whatsoever.

(c) From beginning any action of any nature whatsoever against your orators, their officer, agents and employees, or against any other person to prevent or hinder in any way the sale of the stocks, bonds and other securities in the State of Michigan.

(d) From publishing any information as to the stocks, bonds or other securities owned or dealt in by your orators.

(e) From arresting or causing the arrest of any officer, agent or employee of your orators, or any person who may within the State of Michigan sell, offer for sale, take subscriptions for or negotiate for the sale in any manner, or profess to sell any of the stocks, bonds or other securities owned or dealt in by your orators.

And that said defendants and each and all of them may be in the meantime so restrained during the pendency of this suit.

And that your orators may have such other relief as may be agreeable to equity and good conscience.

N. W. Halsey & Co.
By H. W. Stuart, President.
Continental and Commercial Trust and
Savings Bank, Chicago,
By Henry C. Olcott,
Manager Bond Department.

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Arthur B. Leach, Ferry W. Leach and George B. Olmstead, a Co-partnership doing business as A. B. Leach & Co.,

By F. W. Leach.

Lee Higginson & Co. and Henry L. Higginson, James J. Storrow, Geo. C. Lee, N. Penrose Hallowell, Hugh G. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Fred'k W. Allen, David Shaw and A. James Sheldon,

By Samuel W. White, Their Agent.

Beaumont, Smith & Harris,
Solicitors for Plaintiffs,
Address: Ford Building, Detroit, Michigan.

State of Illinois, County of Cook, ss.

Harold L. Stuart, being duly sworn deposes and says that he is President of N. W. Halsey & Company, one of the plaintiffs above named, that he is authorized to sign the foregoing Bill of Complaint for the said complainant for said plaintiff, N. W. Halsey & Company, that he has heard same read and that the same is true except as the matters therein stated to be on information and belief, and as to those he believes it to be true.

Harold L. Stuart.

Subscribed and sworn to before me this 27th day of August, 1915.

Robert A. Jamieson,
(Notarial Seal.) Notary Public.
My Commission expires July 21, 1917.

State of Illinois, County of Cook, ss.

Henry C. Olcott, being duly sworn deposes and says that he is Manager of the Bond Department of the Continental and Commercial Trust & Savings Bank one of the plaintiffs above named, that he is authorized to sign the foregoing bill of complaint for the said plaintiff, that he has heard same read and that the same is true except as the matters therein stated to be on information and belief, and as to those he believes is to be true.

Henry C. Olcott.

Subscribed and sworn to before me this 27th day of August, 1915.

W. F. Furbeck,
(Notarial Seal.) Notary Public.

State of Illinois, County of Cook, ss:

Ferry W. Leach, being duly sworn deposes and says that he is one of the partners of the firm of A. B. Leach & Company and one of the plaintiffs above named, that he is authorized to sign the foregoing bill of complaint for the said plaintiffs, partners in A. B. Leach & Company that he has heard same read and that the same is true except as the matters therein stated to be on information and belief and as to those he believes it to be true.

Ferry W. Leach.

Subscribed and Sworn to before me this 27th day of August, 1915.

Harry L. Jewel,
(Notarial Seal.) Notary Public.

State of Illinois, County of Cook, ss.

Samuel W. White, being duly sworn deposes and says that he is agent, at Chicago, Illinois, for Lee Higginson and Company, and one of the plaintiffs above named, that he is authorized to sign the foregoing Bill of Complaint for the said plaintiff, Lee Higginson & Company and the partners in said Lee Higginson & Company as set forth in said bill, that he has heard same read and that the same is true except as the matters therein stated to be on information and belief, and as to those he believes it to be true.

Samuel W. White.

Subscribed and sworn to before me this 27th day of August, 1915.

Claude B. Cumnock,
(Notarial Seal.) Notary Public.
My Commission expires Oct. 22, 1916.

Exhibit "A," (Act No. 46 of Michigan Public Acts of 1915.)

Exhibit "B," (Blanks for Statements Required from Investment Companies.)

Form No. 9, Register of Companies' Agents in State.

Form No. 2, Consent Under Section 6, Act 46, Public Acts 1915.

Form No. 3, Appointment of Commissioner of State Banking Dept. etc.

Exhibit "D" (Form No. 5, Dealer's Application for Registration with Michigan Securities Commission.)

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(Copies of above named Exhibits and Forms attached to Bill of Complaint in Case No. 132, See page No. .... of Appeal Record.)

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the within Bill of Complaint on the therein-named Grant Fellows by handing to and leaving a copy thereof with him personally at Lansing in said District on the 4th day of September, A. D. 1915.

Henry Behrendt,
U. S. Marshal.
By.....
Deputy.

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the within Bill of Complaint on the therein-named Frank W. Merrick by handing to and leaving a copy thereof with him personally at Lansing in said District on the 8th day of September, A. D. 1915.

Henry Behrendt.
U. S. Marshal.
By.....
Deputy.

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the within Bill of Complaint on the therein-named John W. Haarer by handing to and leaving a copy thereof with him personally at Lansing in said District on the 7th day of September, A. D. 1915.

Henry Behrendt.
U. S. Marshal.
By.....
Deputy.

CHANCERY SUBPOENA.

(Returned, Served and Filed Sept. 14, 1915.)

District Court of the United States of America, For the Sixth Circuit and Eastern District of Michigan, Sitting in Chancery.

The President of the United States of America,

To Frank W. Merrick, Commissioner of Banking of the State of Michigan, at Lansing; John W. Haarer, Treasurer of the State of Michigan, at Lansing; and Grant Fellows, Attorney General of Michigan, residing at Hudson, Michigan, said three above named parties constitute the Michigan Securities Commission, citizens of the State and residents of the Eastern District of Michigan.

You are hereby commanded to be and appear in the District Court of the United States of America for the Sixth Circuit and Eastern District of Michigan, sitting in Chancery, before the Judges thereof, at the District Court Room, in the City of Detroit, Michigan, within twenty days from the date hereof, then and there to answer unto a Bill of Complaint exhibited against you as defendants by N. W. Halsey & Company and Continental & Commercial Trust & Savings Bank, Corporations organized and existing under the laws of the State of Illinois, having their principal office and place of business, at Chicago, being citizens and residents of said State; Arthur B. Leach of South Orange, N. J., Ferry W. Leach of Oak Park, Ill., and George G. Olmstead of Chicago, Ill., Co-partners doing business under the firm name of A. B. Leach & Co., with their principal offices at N. Y., N. Y., and Chicago, Ill., Henry L. Higginson, James J. Storrow and Francis L. Higginson, Jr., residents and citizens of Boston, Mass.; Geo. C. Lee of Westwood, Mass.; N. Penrose Hallowell of Readville, Mass.; Hugh G. Levick of Farmington, Mass.; A. James Sheldon and Frederick W. Allen of New York City, N. Y., and Charles H. Schweppe of Chicago, Ill., and David Shaw, Andover, Mass., as Complainants And this you shall in no wise omit under the penalty of One Thousand Dollars.

Witness, The Hon. Arthur J. Tuttle, United States District Judge for the Eastern District of Michigan, this twenty-eighth day of August, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and fortieth.

Elmer W. Voorheis, Clerk.
By Carrie Davison, Deputy.

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Memorandum.—The above named defendants are required to file their answer or other defense in this suit with the Clerk of this Court, at his office in the City of Detroit, Michigan, on or before twenty days after service of this Writ of Subpoena, excluding the day of service thereof, otherwise the Bill of Complaint may be taken pro confesso against said defendant.

Elmer W. Voorheis, Clerk.
By Carrie Davison, Deputy.

A True Copy.
Attest:.....United States Marshall, by.....Deputy.

RETURN ON SERVICE OF WRIT.

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed Chancery Subpoena on the therein-named Grant Fellows by handing to and leaving a true and correct copy thereof with him personally at Lansing in said District on the 4th day of September, A. D. 1915.

Henry Behrendt, U. S. Marshal.
By .....
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed Chancery Subpoena on the therein-named John W. Haarer by handing to and leaving a true and correct copy thereof with him personally at Lansing in said District on the 7th day of September, A. D. 1915.

Henry Behrendt, U. S. Marshal.
By .....
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed Chancery Subpoena on the therein-named Frank W. Merrick by handing to and leaving a true and correct copy thereof with him personally at Lansing in said District on the 8th day of September, A. D. 1915.

Henry Behrendt, U. S. Marshal.
By .....
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

In Equity.

No. 132.

The Weis Fibre Container Corporation, a South Dakota Corporation,

Plaintiff,

vs.

Frank W. Merrick, John W. Haarer and Grant Fellows,

Defendants.

BILL OF COMPLAINT.
(Filed August 28, 1915.)

To the Honorable, the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division:

The Weis Fibre Container Corporation brings this, its Bill of Complaint, against Frank W. Merrick, John W. Haarer and Grant Fellows, and thereupon said plaintiff complains and alleges:—

1. That said plaintiff is and has been for some time past, a corporation, organized and existing under the laws of the State of South Dakota, and having its principal office and principal place of business at the City of Huron, North Dakota, and being a citizen of said State of North Dakota and a resident of the District thereof.

2. That at this date and heretofore the said Frank W. Merrick, John W. Haarer and Grant Fellows, are and have been residents and citizens of the Eastern District of Michigan, the said Frank W. Merrick residing at Lansing, Michigan, the said John W. Haarer at Lansing, Michigan, and the said Grant Fellows at Hudson, Michigan.

That the said Frank W. Merrick is Commissioner of Banking of the State of Michigan, John W. Haarer, Treasurer thereof, and Grant Fellows, Attorney General thereof.

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That the said Frank W. Merrick, John W. Haarer and Grant Fellows constitute the Michigan Securities Commission as hereinafter described and set forth.

3. That your orator is incorporated under the laws of South Dakota with a capital stock of Two Million ($2,000,000.00) Dollars, all of which is common stock, and of which One Million One hundred nineteen thousand ($1,119,000.) Dollars has been issued. That the purpose of your orator is to manufacture, buy and sell paper, paper or fibre containers and certain other similar products. That your orator is not an investment company but is a manufacturing company; that the issue of its securities is not supervised or regulated by any public service board or commission; that the proceeds of its stock and securities are employed in the prosecution of its business and are not otherwise invested.

4. That of its said capital of Two Million ($2,000,000) Dollars, One Million and Seventy-five Thousand ($1,075,000) Dollars has been paid for by the transfer, to said corporation of certain property in the manner approved by the statutes of South Dakota. And your orator has complied with the statutes of Michigan relating to foreign corporations desiring to do business in Michigan and is duly authorized to do business therein.

5. That your orator is solvent and the business of your orator is profitable; that its property is ample to discharge all its obligations and that its stock is valuable.

6. Your orator shows that in the operation of its business it has acquired a valuable good will and has developed methods of operating its business which are valuable to it; that it possesses valuable information as to the business of manufacturing said fibre containers; that it owns valuable patents in relation thereto. That it has made valuable arrangements with the its employees, and has valuable information as to the cost of its manufacturing operations, all of which are valuable property rights to your orator.

7. Your orator shows that it has offered for sale its said stock and has offered the same for sale in Michigan, both itself, and through its agents and employees; that it still desires to sell an additional amount of said stock that is as yet unissued.

8. Your orator shows that the plan of business of your said orator is not fraudulent and that it is not of such a nature that the sale of its said stock will work a fraud on the purchaser. That on the other hand said

plan of business and said stock will, in all probability, bring profit to the purchaser of said stock. That all the representations which your orator has made as to stock are true and that the representations and statements that are being made in connection with the sale and offering for sale of said stock in the State of Michigan are true.

9. Your orator further shows that it has solicited various persons within the State of Michigan to offer said stock for sale in Michigan, and that they have informed your orator that said stocks cannot be sold in Michigan unless full compliance is made by your orator with the provisions of Act Number 46 of the Public Acts of 1915 of the State of Michigan, which has become effectual in the State of Michigan upon the 20th day of August, 1915. That a copy of said Act is attached hereto and marked Exhibit "A" and made a part of this your orator's bill of complaint.

10. Your orator shows that said Act 46 of the Public Acts of 1915 of the Legislature of the State of Michigan is entitled to "And Act to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State of Michigan by any dealer, firm, company, association or corporation, foreign or domestic, by requiring an inspection of such stocks, bonds, or other securities and an inspection of the business of such persons, firms, companies, associations or corporations, including dealers and agents, and such regulation and supervision of the business of said persons, firms, companies, associations, or corporations, including dealers and agents as may be necessary to prevent fraud in the sale within the State, of any stocks, bonds or other securities, and to provide a penalty for the violation thereof, and to repeal act number one hundred forty-three of the Public Acts of Nineteen hundred Thirteen, approved May Two, Nineteen Hundred Thirteen, and all other acts or parts of acts inconsistent herewith."

11. That said Act 46 of the Public Acts of 1915 purports to create a Commission to be known as the Michigan Securities Commission composed of, the Commissioner of the State Banking Department, the State Treasurer and the Attorney General of the State (Section 1), which Commission is by said Act given power, and upon it is imposed the duty to administer and to provide for the enforcement of the provisions of the

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said Act; that said Act purports to define foreign and domestic investment companies, and to include in such definition every person, corporation, co-partnership, company or association organized under the laws of any state, territory or government, which shall by itself or by or through others sell or negotiate for the sale of any stocks, bonds or other securities, issued by him, it or them within the State of Michigan (Section 2). That said Act does, however, exempt from the provisions certain securities which are listed in detail in Section 3 thereof to which Section reference is hereby made. That the said Michigan Securities Commission created by said Act does, as your orator is informed and believes, construe the said Act to embrace within such definition of said investment companies, any person, corporation or co-partnership, company or association which shall by itself or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, it or them, within the State of Michigan and not therein specifically exempted, and does include therein your orator as such an investment company. That said act does likewise purport to make said Michigan Securities Commission the successor of the Michigan Securities created by Act 143 of the public acts of 1913 and provides that all proceedings pending before said last named commission and all actions both civil and criminal pending under said act shall be confined and completed under said Act 46 of the Public Acts of 1915.

12. That said Act likewise does provide that before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner whatever in this State any stocks, bonds or other security of its own issue, the investment company, whether domestic or foreign, shall file with the Michigan Securities Commission, certain statements and documents specifically provided for, and described in Section 4 of said Act, which statements and documents shall be authenticated as therein provided, and shall contain a statement showing in full detail the plan upon which it proposes to transact business such itemized accounts of its financial condition, assets and liabilities, and such information as to its business and affairs as is required by said Act, including a copy of its prospectus and proposed advertisements. That the said Act likewise provides for the payment of certain fees to the said Michigan Securities Commission, likewise to be paid before selling, offering for sale, taking subscriptions for or negotiating for the

sale, in any manner, any such stocks, bonds or other securities.

13. That the said Act likewise provides, that also, before offering for sale any of such stocks, bonds or other securities within the State of Michigan, the Company so offering same for sale shall file its irrevocable consent that suits and actions may be commenced against it in the court of any County in such State of Michigan where a cause of action may arise or in which the plaintiff may reside, by service of any process or pleading authorized by the laws of Michigan on the Commissioner of the State Banking Department (Section 6).

14. That said Act further provides in Section 7 thereof that application of such investment company shall be heard by the Commission at its next regular monthly meeting, providing that the filing of such application shall precede such meeting by 24 hours, or at an adjourned or special meeting on 2 days notice to the applicant.

15. That said Act likewise provides that said Commission may demand from such investment company any further information which may be necessary to enable the Commission to pass on the questions which may come before it. That said Commission may cause an appraisal to be made of the property of said investment company (Section 8) and may fix the amount of stocks, bonds and securities which shall be issued by any corporation, foreign or domestic, in payment of property, patents, good-will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued shall be deposited in escrow under such terms as the Commission shall prescribe. That it likewise provides that said Commission may withhold the license of such corporation to sell such stocks and securities if said corporation has issued securities in payment for property, patents, good-will, promotion and intangible assets in excess of the value fixed by the Commission or if such securities are not deposited in escrow as required by the Commission, until such securities in excess of the value found by the Commission have been surrendered to the corporation and cancelled by it and until the stock has been deposited in escrow as prescribed by the Commission.

16. That said Act does further provide, in Section 9 thereof, that upon the filing of said statements and documents with the said Michigan Securities Commis-

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sion, as provided in the preceding Sections of said Act, and upon an examination by the Commission of the business and affairs of the Company, and upon the filing of such statements and documents which the aforesaid Commission shall deem it advisable to have filed, the said Commission shall examine such statements and the results of such investigation and if, after such examination, as in said Act provided, said Commission shall find that the proposed plan of business or its proposed contracts, stocks, bonds or other securities are fraudulent, or that its proposed contracts, stocks, bonds or other securities are of such a nature that the sale of said contracts, stocks or bonds or other securities would, in the opinion of the Commission, work a fraud upon the purchaser thereof, then the said Michigan Securities Commission shall disapprove the sale of such contracts, stocks, bonds or other securities and shall notify said company by registered mail, of its findings and disapproval, and it shall be unlawful for said company to do any business in the way of selling or offering for sale such securities within said state. That however if the said Commission shall not find that the proposed plan of said investment company or its proposed securities are fraudulent or are of such a nature that their sale would, in the opinon of the Commission, work a fraud on the purchaser, then it shall approve the sale of such stocks and shall issue a certificate in the form prescribed by the statute.

17. Said Act likewise provides among other things, and particularly in Section 10 thereof, that any person, corporation or co-partnership which is not the issuer of such securities but which shall in this state sell or offer for sale any of the securities of any investment company as in said Act defined, except such securities as are specifically exempted in the Act or which shall by advertisement or otherwise, profess to engage in the business of selling or offering for sale such securities shall be deemed to be a "dealer" in such securities and that no such dealer shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities, unless he shall have filed a list of same with the Commission.

It further provides that the term "dealer" shall not include the owner of such securities who sells securities owned by him when such sale is not in the course of continued and successive transaction of a similar nature, nor shall it include one who in a trust capacity, created

by law, lawfully sells any securities embraced in said trust.

It further provides that any dealer desiring to sell the securities of an investment company shall register both himself and his agents with the said Commission, furnish it certain information required by it and pay to it certain fees both for said dealer and any agents thereof (Section 11).

That if said dealer shall be a non-resident of the state he shall file an irrevocable appointment of the Commissioner of the State Banking Department of Michigan as his or its agent in Michigan for the service of process.

Said Act further provides, as to said dealers, by Section 15 thereof that no dealer, as defined by the Act, shall sell or offer for sale any securities unless the provisions of the Act shall have been complied with as to such securities or until he shall have registered with the Commission; such dealer, if the investment company issuing the securities which the dealer desires to sell, has not itself complied with the Act may make application to the Commission for license to sell said securities in the manner provided for applications by the investment company.

18. Said Act likewise provides in Section 13 thereof that the general accounts of every investment company as defined in said Act shall be kept in sufficient detail so that the Commission can ascertain at any time its financial condition and that such books of account at all times during business hours except on Sundays and Holidays shall be open to stockholders and investors in said Company and the said Commission or its representatives.

19. Said Act likewise provides that all such investment companies as therein defined shall be subject to examination by the Commission or any member thereof at any time said Commission shall deem it advisable and shall pay a fee for such examination, and the expenses of such examiners: and that their failure to pay such fee shall forfeit their right to sell their securities within the State of Michigan.

That if upon any such examination it shall be made to appear to said Commission that further sale of the securities of such company would work a fraud on the purchaser, then the Commission may revoke the license of said investment company, on notice duly given and hearing had, and may, pending such hearing, suspend

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20. That the said Act provides in Section 14 thereof, that it shall be unlawful for any such investment company, dealer or representative thereof either directly or indirectly to sell, offer for sale, take subscriptions for or negotiate for the sale in any manner of such stocks, bonds, or other securities except as in said Act exempted unless and until the said Commission has approved the same and issued its certificate of such approval. That said Act likewise provides that it shall be unlawful for any such investment company to transact business on any other plan than is set forth in the statements and papers required to be filed by said Act.

That said Act likewise provides that it shall be unlawful for any investment company or dealer to issue, circulate or deliver any prospectus or advertisement differing from the copy filed with the Commission. That said Act likewise makes it unlawful for any newspaper to advertise the sale of any stocks, bonds or securities not approved by the Commission and not exempt under the Act.

21. Said Act also provides in Section 16 thereof that all the information obtained by the Commission with reference to such security, and all its records in reference thereto shall be open to the public and that it may from time to time issue, in pamphlet form or in newspaper advertisements, or otherwise, such information as it deems would be of public interest with reference to the securities sold or offered for sale within the state.

22. Said Act likewise provides in Section 17 thereof that it shall not be construed to repeal or modify any laws giving the State Banking Department control and supervision over State banks and the business of banking or the Commissioner of Insurance control and supervision over the business of insurance in this state.

23. Said Act likewise provides in Section 19 thereof, that any person who shall knowingly or willfully subscribe to or make or cause to be made any false statement or false entry in any book of any investment company with the intention or for the purpose of deceiving any person authorized to examine the affairs of such company or shall make or publish any false statement of the financial condition of such company or false statement relative to its securities shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not more than $1,000.00 or imprisoned in the County Jail

for not more than one year, or both such fine and imprisonment.

24. Said Act likewise provides in Section 20 thereof that the said Michigan Securities Commission shall provide for furnishing information as to any such investment company to those who should apply therefor. It likewise provides for the disposition of the fees collected from such investment companies and appropriates funds for the maintenance of said Commission.

25. Said Act likewise requires, in Section 21 thereof, that the said Investment Company, as therein defined, shall file during the month of January in each year a detailed statement showing its condition at the close of business on the preceding December 31st, which said statement shall also contain such other information as the Commission may require. Such report shall be accompanied by a filing fee of One Dollar.

26. Said Act likewise provides in Section 22 thereof, that the Supreme Court may review any final order of determination of the Commission upon a writ of Certiorari but provides no other methods of apppeal from the findings of such Commission.

27. Said Act likewise provides that any person or persons who shall willfully violate any of the provisions of the Act shall be deemed guilty of a misdemeanor and be fined for such offence not more than $1,000, or be imprisoned in the County Jail for not more than one year, or both.

28. That said defendants have been acting under the pretended authority of Act 143 of the Public Acts of Michigan of 1913 and have claimed authority to enforce same and administer same at least as to Michigan domestic investment companies as in said Act 143 defined. That acting under said pretended authority of said Act 143 the said defendants have approved as so-called "Standard Manuals of Information" certain manuals as follows:

The Standard Statistics Bureaus Daily Bond Service.

The Standard Statistics Bureaus Daily Stock Service.

Poor's Manual of Railroads.

Poor's Manual of Public Utilities.

Poor's Manual of Industrials.

Moody's Manual of Railroad and Corporation Securities and a certain manual of securities published by the Detroit Stock Exchange of Detroit, Michigan, en-

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titled Michigan Manual of Corporation Statistics and The Annual Financial Review.

That said manuals above named and the manuals approved by the said Commission do not contain the information which is required by the Act to be furnished to the Commission by the so-called investment companies not listed in said manuals.

That the manuals approved by said defendants contained statements as to companies whose stocks, bonds and securities are valueless and are of such a nature that their sale unless it should be accomplished by a full disclosure or understanding as to the actual value of such securities, would work a fraud on the purchaser thereof, and the approval thereof permits the sale of such securities.

29. That as to certain of said so-called manuals, to-wit, the "Standard Statistics Bureau Daily Bond Service," the avowed purpose thereof is the supplying of all available information as to securities. That said "Services" supply information as to failing concerns and as to fraudulent securities as matters of information to their clients and the approval of all of said "Services" is, therefore, an approval of such fraudulent securities, such failing and insolvent investment companies and securities as well as of solvent investment companies and securities which are valuable and will result in profit to the purchaser.

That the listing of persons, corporations, companies or co-partnerships and their securities in said manuals involves no determination, whatsoever, as to their solvency or the fraudulent or non-fraudulent character thereof but they are so listed either by the procurement of such persons, corporations, companies or co-partnerships and the payment of a fee therefor for advertising purposes or by the publishers of said manuals as matters of financial news.

The approval of said manuals therefore does not involve a determination by the defendants herein that the plan of business of any company there listed or its securities are not fraudulent or that such securities will not in all probability work a fraud to the purchaser thereof.

30. That said defendants acting under the pretended authority of Act 46 of the Public Acts of 1915 have continued to approve and do now approve said "Standard Manuals of Information" in the last paragraph described.

That the approval of such manuals is an exemption of the securities therein. That the power to approve said manuals so given by said Act is a delegation of the power to exempt securities and the so-called investment companies, from the Act itself and from all the provisions and restrictions thereof and is such a delegation to the Commission and to the publishers of said manuals.

31. That said defendants have likewise issued certain blanks upon which are to be made the statements required from "investment companies" as defined by said Act as a condition precedent under said Act before the stocks, bonds and other securities of such companies can be sold or offered for sale in Michigan. That a copy of such blank is attached hereto and marked Exhibit "B". That it is the blank which your orator is required to fill out and the statement which it is required to make in order that it may sell or offer for sale its stocks, bonds and other securities in Michigan, either through itself or its agent and in order that others may sell such securities in Michigan.

32. That said blank requires that your orator furnish information which is unreasonable, not pertinent to the purpose for which said statement is required under the Act and substantially impossible to furnish.

(a) Said blank requires a statement of the consideration paid for stocks and bonds whereas the consideration paid for the stock of your orator is certain property and the same has been duly paid in accord with the requirements of the statutes of the state under which your orator is incorporated.

(b) It requires a true and complete list of the holders of the securities of your orator whereas such list is constantly changing and cannot be truly and completely made.

(c) It requires a profit and loss statement which is not in conformity with the account upon its books and which cannot be made in the manner required in the blank from the books of your orator.

(d) It requires a true and complete statement of its receipts and disbursements for the past six or twelve months whereas such a statement would be cumbersome in the extreme, would convey no information to said defendants pertinent to said purpose expressed in said Act.

(e) It requires a list of the officers of the investment company together with their holdings of stock and

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bonds in said company, the actual cash invested, their estimated net worth and the time devoted to the company whereas the number of shares and bonds owned is a matter confidential to said officers which your orator has no right to divulge, nor has your orator accurate information thereof; nor has your orator any way in which to determine the actual cash invested by such officers in your orator; nor the estimated net worth of said officers of your orator. And your orator charges that all such information is not pertinent to the purposes of said Act and beyond the power of said defendants to require.

(f) It required certain references as to the character, responsibility and financial standing of each director of your orator whereas the giving of such reference is not pertinent in any way to the purposes of said Act and beyond the power of said defendants to require.

33. That by reason of the requirements of said defendants as to said statement which must be filled by your orator before it can sell or offer to sell its securities in Michigan, the property rights of your orator are invaded and destroyed and its freedom of contract curtailed, impaired and destroyed and it will be otherwise seriously damaged in its business and property.

34. That by reason of the enforcement of said law and the requirements of said defendants and the requirements of said statements so to be filed, your orator cannot sell or offer to sell within the State of Michigan, its stocks, bonds and other securities.

35. That, even if your orator did comply with said requirements of the said Act and of the said defendants, your orator would be, by said Act, deprived of the right to sell its stocks, bonds and other securities in Michigan for a period of not less than 24 hours and for a much longer period unless its said application should be filed 24 hours before the regular meeting of said Commission, after the furnishing of such statement and the compliance by your orator with said Act.

That the first regular meeting of said Commission will be held on Friday the third day of September, 1915, and unless said Commission should hold a special meeting your orator would be deprived of the right to sell its stock from the date of this your orator's bill of complaint to said third day of September, 1915.

36. That not only is your orator deprived of its right to sell such securities in Michigan but brokers and

dealers in such securities are likewise deprived of said right and owners thereof are also deprived of the right to sell same through brokers and dealers except in compliance with the terms of said Act and the requirements of said defendants.

37. That by reason of the heavy penalties in said Act set forth, brokers and dealers in the securities of your orator and in similar securities fear to sell same or offer same for sale in Michigan, and your orator is deprived of the power to sell same in Michigan in any way whatsoever.

38. That the right to sell such stocks and bonds and securities is a valuable right to your orator. That the proceeds thereof are required to properly extend and carry on the business of your orator. That to deny your orator the right to sell same in Michigan endangers the present business of your orator and threatens to cause your orator serious damage and loss.

That your orator and the other owners of the securities of your orator acquired the same with the right to dispose of same in Michigan and elsewhere and free from any restrictions such as are imposed by said Act and any such restrictions impair the said right and damage said owners and your orator.

39. Your orator shows that the said Act 143 of the Public Acts of 1913, which has been hereinbefore referred to, was attacked as unconstitutional in a certain cause in this court known as Equity Cause 33 brought by the Alabama & New Orleans Transportation Company and others against Edward H. Doyle, John W. Haarer and Grant Fellows, as defendant, they then constituting the Commission created by said Act. That in the said bill of complaint in said cause, the said Act number 143 of the Public Acts of 1913 was charged to be unconstitutional as in said bill of complaint more fully appears. That a preliminary injunction was prayed for in said cause and upon the hearing and consideration thereof the court rendered an opinion thereon declaring said Act unconstitutional and void, which said opinion is set forth and published in 210 Federal Reporter page 173. That thereafter a final decree was rendered in said cause in accordance with said opinion and a permanent injunction issued against the enforcement of said Act by the said defendants. That said Act 46 of the Public Acts of 1915 is substantially a re-enactment of said Act 143 of the Public Acts of 1913 and is substantially identical therewith and its purpose and

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effect is to amend the said Act of 1913. That, while in its terms, it purports to repeal said Act 143 of the Public Acts of 1913, it creates a commission with powers substantially identical with those of the 1913 Commission, designed to regulate investment companies and their securities and dealers therein all as in said Act 143 defined. That said 1915 Act provides for the preservation and continuance of the proceedings pending under the 1913 Act. That it is in effect an attempt to preserve said Commission of 1913 with all its powers, duties and proceedings though that Commission and that law has by this court been declared unconstitutional, inoperative, void and invalid. Your orator charges that it is in all respects in a situation similar to that of the plaintiff, the Alabama & New Orleans Transportation Company, in said suit on the 1913 Act and that it, your orator, is entitled in all respects to participate in the relief decreed by this court in said suit, and is entitled to relief in this suit as if it had in said former action petitioned the court for further relief therein and for the extension of the injunction therein issued against the defendants herein attempting in any way as the Michigan Securities Commission to enforce said Act 143 of the Public Acts of 1913 or said Act 46 of the Public Acts of 1915. Your orator in this connection refers to the records and files in said cause number 33 and makes them a part of this its bill of complaint not, however, setting them out at length.

40. Your orator charges that said Act 46 of Public Acts of 1915 is unconstitutional and void and of no effect and is in violation of Section 21 of Article 5 of the Constitution of the State of Michigan which provides that no law shall embrace more than one object which shall be expressed in its title:

(a) In that the title of said Act includes as one object the prevention of fraud in the sale and disposition of stocks, bonds and other securities and likewise embraces a second object an inspection of the business of persons, firms, companies, associations selling or offering for sale such stocks, bonds and other securities.

(b) In that said Act in the title thereof, provides for the regulation of investment companies. That the Act itself provides for the regulation of manufacturing, transportation, mining and various other companies; that the title of said Act does not therefore express its object.

(c) In that said Act provides in Section 14 thereof that it shall be unlawful for any newspaper for any newspaper published in the State of Michigan to advertise the sale of any stocks, bonds or other securities which have not been approved by the Commission, or which are not exempt under the provisions of this Act. That said provision is not expressed in the title of said Act.

(d) In that the said Act forbids the taking of subscriptions for stock of corporations but such object is not set forth in its title.

(e) In that said Act in the title thereof is entitled an act to prevent fraud, etc., and to provide for an inspection, regulation and supervision of investment companies as there definied as may be necessary to prevent fraud. That said act in so far as it provides that the commission may fix the amount of stock which a corporation may issue for property sets forth an object which is not expressed in its title.

42. Said Act is likewise unconstitutional and void and in violation of the 14th Amendment of the Federal Constitution which provides that no state shall make or enforce any laws which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person equal protection of the law.

(a) Since said Act by its terms is applicable to stocks, bonds and other securities but is not applicable to unsecured commercial paper.

(b) Since said Act is, by its terms, applicable to secured commercial paper but is not applicable to unsecured commercial paper.

(c) Since said Act, by its terms, is not applicable to securities of state and national banks and trust companies but is applicable to banks other than state or national.

(d) Since said Act, by its terms, is not made applicable to building and loan associations but is applicable to other corporations incorporated to own, improve and deal in real property.

(e) Since said Act, by its terms, is made applicable to mortgage securities upon real property situated without the State of Michigan where the entire mortgage is sold and transferred with the notes secured by said mortgage, but said Act is not made applicable to mortgages upon real property situated

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within the State of Michigan, where the entire mortgage is sold and transferred with the notes secured by said mortgage.

(f) Since said Act, by its terms, is not applicable to mortgages upon real property situated within this state where the entire mortgage is sold and transferred with the notes secured by the mortgage, but is applicable to a mortgage on property within this state if said mortgage secures bonds and the entire mortgage is sold with all said bonds, or if said mortgage secures a note or notes and the entire mortgage is not sold with the note or notes.

(g) Since the said Act, by its terms, is made applicable to the stocks of investment companies as defined in said Act when the said stocks are sold by such companies or by agents thereof, but is not made applicable to the stock which is issued by such corporations and sold its stockholders or to stock dividends.

(h) Since the Act, by its terms, forbids the taking of subscriptions for stocks but does not forbid the sale of an increase of stock to those who are already stockholders.

(i) Since said Act, by its terms, is made applicable to the stock of any said investment company as defined in said Act when said stock is sold by said investment company or by its agents but is not made applicable to the stock of said Company when the same is issued to an original subscriber thereto.

(j) Since said Act is made applicable to investment companies as defined in said Act when said investment companies sell or offer for sale an entire issue of its bonds, stocks or other securities when such sale or offer for sale is not made in course of continued and successive transactions of similar nature, but said Act is not made applicable to the sale of such stocks, bonds or other securities by the owner thereof when he sells such securities owned by him when such sale is not made in the course of continued and successive transactions of a similar nature.

(k) Since said Act is made applicable to the dealer, as therein defined, in stocks, bonds and other securities but is not made applicable to one who in a trust capacity created by law, lawfully sells any securities embraced in such trust.

(l) Since such Act is not applicable to securities which are listed in any standard manual of information approved by the Commission and it is applicable

to securities not so listed, though the listing of such securities in such manual is not a finding as to their fraudulent character or whether or not their sale would work a fraud on the purchaser.

(m) Since said Act provides that the said Commission may appraise the property of a corporation and fix the amount of stock which may be issued thereof but does not provide that it may appraise the property of any other form of investment company nor fix the amount of securtiies other than stock which may be issued for property either of a corporation or of any other form of investment company as in said act defined.

43. That said Act 46 is unconstitutional and void and is in violation of Section 8 of Article 1 of the Constitution of the United States and of the 14th Amendment of said Constitution of the United States in that said Act does impose a burden upon interstate commerce in the following particulars:

(a) Said Act forbids the sale or attempt to sell of any stocks, bonds or other securities of any investment company, as defined in said Act, for a definite period of not less than 24 hours from and after the date on which said investment company shall have filed in the office of the Michigan Securities Commission, the statement and information required by said Act, and shall have otherwise conformed to said Act.

(b) Since said Act does prohibit the sale of stocks, bonds and other securities of said investment companies in the State of Michigan unless said investment companies shall in all respects conform to the requirements of said Act.

(c) Said Act does forbid the sale or offer for sale or the taking of subscriptions for or negotiating for the sale in any manner of the stocks, bonds or other securities of said investment companies as defined in the Act until such investment companies, though they be persons or co-partnerships resident in and organized under the laws of another state or country and nonresident or not organized under the laws of the State of Michigan, shall have filed with the said Michigan Securities Commission the report and information required by said Act and by said Commission, paid the fees in said Act prescribed and otherwise conformed thereto.

(d) Said Act does compel any person, firm, copartnership, corporation or association not resident in

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Michigan, who shall there sell or offer for sale any securities of any investment company covered by said act or who shall "by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities" to make reports to said Securities Commission and pay certain fees. It forbids such persons, firms, co-partnerships, corporations or associations under heavy penalties from selling securities unless they shall have in all respects complied with the law. It also forbids such sale or offer for sale within the State of Michigan whether the sale be interstate or intrastate commerce.

In this respect your orator charges that stocks, bonds and other securities sold and offered for sale by your orator are legitimate articles of Commerce and that the sale thereof in interstate commerce is not subject to regulation by the State of Michigan in any way whatsoever, and that the sale thereof by your orator to residents of the State of Michigan to be delivered in the State of Michigan, payment therefor to be made upon such delivery to your orator outside the State of Michigan is interstate commerce and the burdens and restrictions imposed on such sale are burdens upon interstate commerce and unreasonable burdens thereon and render said Act unconstitutional and void.

(e) Said Act purports to give the Commission power to appraise the property of a foreign investment company and to examine its affairs and to fix the amount of securities to be issued by any foreign corporation in payment for property and require the stocks and securities so issued for such property to be deposited in escrow on such terms as the Commission may require. Such provisions are restrictions and burdens on interstate commerce and unreasonable restrictions and burdens thereon and so render the act void and of no effect.

(f) Said Act likewise purports to empower said Commission after the appraisal described in the last paragraph above to withhold its license to the said corporation to sell such stocks and bonds and securities as it may have issued in payment for property in excess of the value of such property as found by the Commission unless or until the said securities are deposited in escrow on terms prescribed by the Commission or unless the said excess amount thereof be surrendered to the corporation and cancelled by it. Said provisions are unreasonable burdens and restrictions on inter-

state commerce and render the said Act unconstitutional and void.

44. The said Act is likewise unconstitutional and void and in violation of the Fourteenth Amendment of the Constitution of the United States, since by its restriction and regulations it deprives your orators and other persons similarly situated of their property without due process of law, and denies to your orator and other persons similar situated the equal protection of the laws, and denies to your orator and others the freedom of contract guaranteed by the said constitution.

(a) In that the said Act deprives your orator of the right to sell its securities in the State of Michigan unless the said securities commission determines, in its opinion that said securities are not fraudulent in that the sale thereof will not work a fraud.

(b) In that the Act deprives your orator and other persons of the right of selling securities, except those exempted by the Act, until they have listed such securities with said Commission and paid certain fees and secured the approval of the Commission thereon.

(c) In that the said Act deprives your orator and any investment company as defined in said Act of the right to sell its stock, bonds or other securities for a definite period of not less than 24 hours even though said investment company should conform in all respects to the requirements of said law.

(d) And it likewise denies the right of your orator and any investment company as defined in said Act from selling or disposing of its stocks, bonds or any security unless the said Commission shall be of the opinion that the sale of its stocks, bonds or other securities will not work a fraud on the purchaser—though in fact said stocks, bonds or other securities are not fraudulent and the sale thereof is without misrepresentation or fraud.

(e) That it likewise denies to your orator and to any investment company as therein defined the right to sell, and to any persons, the right to purchase of your orator or any such investment company, any of its stocks, bonds or other securities not exempted by the Act if said purchase will in the opinion of the Securities Commission work a fraud on the purchaser, irrespective of the price at which said securities shall be sold and irrespective of the probability that such purchase may result in profit to said purchaser.

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(f) It denies to your orator or any said "investment company" the right to sell any such stocks, bonds, or other securities if same will in the opinion of the Commission work a fraud upon the purchaser even though "such investment company" or your orator shall sell same without misrepresentation and after having truthfully set forth all the facts in relation thereto to the purchaser thereof.

45. That said Act is likewise unconstitutional and void and violation of Section 16 of Article II of the Michigan Constitution and of the Fourteenth Amendment of the Constitution of the United States since it does deprive your orator and persons similarly situated of their property without due process of law; inasmuch as the restrictions and conditions prescribed by the Act are not within any power of the State of Michigan to impose and are not within the police power of the said state, in this respect:

(a) That said restrictions and conditions imposed by said Act are not necessary to protect the health, safety, morals and welfare of the people of the State of Michigan.

(b) That such conditions and restrictions as are by said Act imposed are not reasonable to protect the health, safety, morals and essential welfare of the said people of the State of Michigan, since such restrictions and regulations are imposed upon the business of selling all securities of every kind except as exempted in said Act and will seriously impede business and commerce and seriously interfere with business and commerce of every kind whatsoever by preventing the free purchase of said securities and the free investment in th stocks and bonds and securities covered by the Act.

46. That the provisions in said Act in Section 8 thereof are likewise unconstitutional and void.

(a) Said section provides that said Commission may cause an appraisal to be made of any investment company seeking to come under the Act and may fix the amount of stocks, bonds and securities that shall be issued by such corporation in payment of such property at the value at which it shall so appraise said property and may require such stocks and securities to be deposited in escrow on such terms as it may prescribe. It may likewise withhold its license to said corporation to sell such securities unless said securities which may have been issued in excess of the value fixed by the

ration or cancelled by it or deposited in escrow as the Commission shall prescribe.

The aforesaid provision is an absolute prohibition of the sale of stock paid for in property unless the Commission approved the value of said property as equal to the par value of the stock issued therefor.

The said prohibition of such sale is not based on fraud in said stock or the fraudulent character thereof or fraud in the sale thereof but upon the opinion of the Commission as to the value of the property for which it is issued. The test to be applied by the Commission is not fraud or the probability of fraud but the probability of loss.

The said provision contravenes the Constitution of the United States and the 14th Amendment thereof also the 16th Section of the Constitution of Michigan.

(b) That said Act is likewise unconstitutional and void and in violation of the 14th Amendment of the Constitution of the United States in that it provides that the said Commission may cause an appraisal to be made at the expense of the investment company of its property and may fix the amount of stocks, bonds and other securities which may be issued by said investment company, foreign or domestic, for such property and may require such securities to be deposited in escrow under such terms as it may prescribe and may withhold the license to sell such securities if said company has issued same in excess of the value of said property as fixed by the Commission unless said securities shall be surrendered and cancelled or deposited in escrow under the terms prescribed by the said Commission.

Your orator charges that the making of such appraisal constitutes a taking of property without due process of law. That it has acquired in its charter the right to issue securities to the amount there set forth and the requirement that said stock be delivered up and cancelled or placed in escrow is likewise a taking of property without due process of law.

It shows that the right to dispose of stocks and securities paid for in property as provided in the statute and set forth in its charter is a right which cannot be abridged by a requirement that such stocks or securities shall be surrendered or deposited in escrow at the will of or upon the terms prescribed by the Commission.

47. That said Act is likewise unconstitutional and void and in violation of Section 16, Article II of

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the Michigan Constitution and of the Fourteenth Amendment to the Constitution of the United States.

(a) Since said Act purports to regulate and restrict the right of the corporations, co-partnerships, associations, persons and firms who by said Act are defined as "dealers" and provides that the said dealers shall not sell nor offer for sale any securities nor profess the business of selling or offering for sale any securities covered by the Act unless such dealers shall have otherwise complied with the requirements of said Act; that insofar as said Act attempts to classify and define said dealers in said securities it is unconstitutional and void, inasmuch as it denies to said dealers as therein defined the equal protection of the law; that in defining and classifying those who sell or offer for sale any of the stocks, bonds or securities issued by investment companies as defined in the Act, said classification is unreasonable, invalid and void.

(b) Since said Act purports to prohibit any "dealers" as therein defined from selling or offering for sale any stocks, bonds or other securities covered by said Act unless said dealers shall furnish the said Commission a statement as to their names and addresses, the general character of the securities to be dealt in by them, the place of their office in Michigan; and such additional information as the Commission may deem necessary and that such dealer shall likewise file with said Securities Commission an appointment of the Commissioner of the State Banking Department as his agent in Michigan for the service of process.

48. Said Act is likewise unconstitutional and void and in violation of the Constitution of the State of Michigan and of the Constitution of the United States in that the powers and duties conferred upon the said Michigan Securities Commission involves the delegation of legislative power to the said Commission. Said Act confers upon the said Commission the power to determine whether the proposed plan of business or its proposed stocks, bonds, and other securities of the said investment company or of your said orator is or is not fraudulent. It likewise confers upon the said Commission power to determine whether the sale of said contracts and securities of your orator as a said investment company would, "in the opinion of said Commission," work a fraud on the purchaser thereof.

That the said Act in no respect determines the standard of what is or is not fraudulent and in no re-

spect determines what securities would be fraudulent and in no respect determines what would be the nature and character of securities the sale of which would in the opinion of said Commission work a fraud.

But said Act on the other hand confers upon the Commission the power to fix, by its opinion what is or is not fraudulent.

Insofar as said Act does not determine the standard by which said plan of business and said securities are in this respect to be adjudged, it is a delegation of a legislative power, and therefore, void.

49. That the said Act is likewise unconstitutional and void and in violation of the Constitutions of the United States and of the State of Michigan, inasmuch as it confers upon the said Michigan Securities Commission the authority and power to determine what is a fraudulent plan of business, a "fraudulent security" and a security the sale of which will work a fraud. That thereby it confers upon said Commission judicial authority; that said Commission is not a judicial body, within the provisions of the Constitution of the State of Michigan and of the United States, and the delegation thereto of judicial power to determine the questions as above set forth is in violation of said Constitution and said Act, therefore is void.

50. That the said Act is likewise unconstitutional and void and in violation of the 14th Amendment of the Constitution of the United States in that it denies to your orator and to the persons, associations, corporations and partnerships made, by its terms, subject thereto, the right to a judicial investigation by due process of law, of the facts as to whether or not the plan of business of your orator and such corporations is or is not fraudulent; as to whether or not the securities issued thereby are or are not fraudulent, or whether such securities are or are not of such a nature that their sale will work a fraud upon the purchaser.

51. That said Act is likewise unconstitutional and void in that it denies the due process of law guaranteed by the Constitution of the United States to your orator, in that the determination of the said Commission upon the question as to whether or not the plan of your orator is fraudulent and whether its securities are fraudulent, or that they will in all probability work a fraud upon the purchaser thereof is final; and that the said Act does not provide an appeal from the said finding

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for a review of such findings by certiorari only. That the said Act does in effect provide that the Commission shall conclusively determine the questions of fact which may be submitted to it in the course of investigation of the said plan of business of your orator and of its securities.

52. That said Act is likewise unconstitutional and void and in violation of the 14th Amendment of the Constitution of the United States in that it deprives your orator and others similarly situated of liberty and property without the due process of law and denies to your orator and others equal protection of the law, since said Act provides that said defendants and the Michigan Securities Commission, its clerks, accountants and examiners may examine the business of your orator and its accounts, may require it to divulge any and all facts in connection with said business whether or not the same relates in any way to the securities proposed to be sold in Michigan.

Your orator shows that said defendants have announced what facts and information in connection with said business the said Commission would require in its preliminary statement upon which the securities of your orator and others similarly situated will or will not be listed by said Commission and that many of such facts of such information do not relate to the question of whether or not such securities are fraudulent or as to whether their sale would work a fraud. Nevertheless said Act does further provide that all such information obtained by said Commission and all the records of the Commission in regard thereto shall be open to examination by the public.

Whereas your orator charges that its information as to its said business, its contract with its employees and with others, its knowledge as to the methods by which it transacts its affairs, its knowledge as to the credits of its customers, its general information as to the conduct of its business, the prices and the costs of the products which it sells, each and all are property rights of value to your orator and the publication of information thereto as to your orator's business deprives it of valuable rights, seriously damages it in its business and will otherwise cause it damage and loss.

53. That said Act is likewise unconstitutional and void in that it subjects your orator and others similar situated to cruel and unusual punishments in violation

igan in that it prescribes as penalty for the sale or offer for sale of any of the stocks, bonds or other securities of your orator or other investment companies, unless said companies shall have complied with the provisions of the Act, and unless the dealers described in said Act shall have registered with the Commission as prescribed and provided, and provides that the said violation of the Act in that respect shall be a misdemeanor and any person who has so violated said Act shall, upon conviction thereof, be fined not more than $1,000.00 or imprisoned in the county jail for not more than one year or both, and any intention to defraud any purchaser of stock, bonds or other securities or any intention to wilfully violate said Act is not required to make said violation a misdemeanor.

That any person who shall knowingly or wilfully make or cause to be made any false statements or false entries in the books of the company shall likewise be guilty of a felony, and any person who shall exhibit any false paper with the intention of or for the purpose of deceiving any person authorized to investigate said investment company's affairs, or who shall make any false statements relative to the securities of same, shall likewise be guilty of a misdemeanor and upon conviction shall be fined not more than $1,000 or imprisoned in the county jail for not more than one year, or both. That by the statute of the State of Michigan making false statements in reference to the condition of any corporation is already made a crime and made punishable under the law of said state by heavy penalties.

54. That said Act is likewise unconstitutional and void since it prescribes extraordinary and unusual punishment and penalties for violation thereof, and provides penalties of fines or imprisonment in the county jail for the sale or offer for sale of any of the securities covered by said Act, and provides other penalties, fines and imprisonments, all of which are so extreme and cumulative that they prevent any person, firm or corporation as described in said Act, or a dealer as therein described from challenging the validity of said Act in the courts, and necessarily constrain all persons to submit to the provisions of said Act rather than take the chance of the penalties imposed. That, therefore, said Act in that respect deprives your orator and other persons similarly situated of the equal protection of the law guaranteed to it by the Constitution of the United States

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55. Your orator further charges that said Act declares that all proceedings pending before the Michigan Securities Commission created by Act 143 of the Public Acts of 1913 shall be continued by said Act 46 of 1915 and all actions civil and criminal pending under said Act 143 of 1913 shall be continued and completed under said Act 46.

Your orator charges, however, that said Act 143 of the Public Acts of 1913 has been declared and decreed to be unconstitutional and void by the District Court of the United States for the Eastern District of Michigan in a suit entitled the Alabama and New Orleans Transportation Company et al. vs. Edward J. Doyle et al., being equity cause No. 33 on the docket of said court. That the opinion in said cause is reported in 210 Federal Reporter 173, all of which records and files and said opinion are as hereinbefore set forth made a part of this bill of complaint. That by said decree Act 143 of 1913 was declared null and void and of no effect whatsoever. That the said Michigan Securities Commission created by said Act 143 has no valid constitutional authority either as to investment companies as there defined resident in Michigan or as to non-resident investment companies or as to dealers as defined in said Act or their agents or as to your orator, and any pretended authority of any kind in said Commission is contrary to law. The proceedings of said former commission cannot, therefore, be continued nor the actions brought under said former Act completed. And Act 46 of 1915 in so far as it attempts to validate such void and invalid proceedings of said former commission is now void and of no effect whatsoever.

56. Your orator charges that it is its desire and right to offer its stock, bonds and other securities for sale in the State of Michigan by itself or through brokers and that it is the avowed purpose of the said defendants herein to prevent such sale and offer for sale unless your orator and such other persons shall have complied in all respects to the requirements of said Act and the requirements of said defendants.

57. That immediate and irreparable injury will be caused to your orator by reason of the enforcement of said Act and particularly by the fact that your orator, its agents and employees will be prevented by said Act from selling its said securities in Michigan except in compliance with said Act and not at all for at least 24 hours after listing same as provided in said Act.

58. That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the conduct of said defendants in the enforcement made by said defendants and the Michigan Securities Commission and to prevent a multiplicity of suits against your orator, its officers, agents and employees, brokers and dealers in its securities and owners of its securities, desiring and intending to offer same for sale through dealers and agents and that to prevent prosecution under said Act and the imposition of the heavy penalties described by the Act and to prevent such injury to persons intending and desiring to purchase such securities, a writ of injunction is necessary to restrain the said defendants from interferring with your orator and other persons similarly situated and agents and employees of your orator, dealers in its stocks, bonds and other securities and any and all persons owners of said securities who may desire to sell same in a manner not permitted by said Act.

59. That the value of the matter herein disputed the loss which your orator is sustaining and will sustain by the enforcement of said Act and the damage to your orator's business as hereinbefore set forth will be to greatly exceed the sum of five thousand dollars exclusive of interest and costs.

60. Forasmuch, therefore, as your orator has no remedy in the premises save in a court of equity your orator prays the aid of the court:

(a) To the end that the said Frank W. Merrick, John W. Haarer and Grant Fellows, defendants herein, may without oath (answer on oath being expressly waived) full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged.

(b) And to the end that said Act 46 of the Public Acts of 1915 may be decreed to be unconstitutional and void and of no effect whatsoever.

(c) And to the end that your orator and its agents, employees and brokers and the dealers in its stocks, bonds and other securities may be decreed to have the right to sell and offer for sale the said stocks, bonds and other securities of your orator, without compliance in any way with the regulations and restrictions in said Act set forth.

(d) And your orator, its officers, agents and employees and those who may sell or offer for sale or profess to sell the stocks, bonds and other securities of

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your orator, may be secured against unlawful and illegal trespasses and arrests by reason of any alleged violation of said Act.

And that the said Frank W. Merrick, John W. Haarer and Grant Fellows, their agents and employees of every kind whatsoever and the agents and employees of said Michigan Securities Commission may be perpetually and forever restrained by the order and injunction of this court from:

(a) Enforcing and attempting to enforce any of the provisions of said Act 46 of the Public Acts of 1915 and

(b) From hindering or in any may whatsoever attempting to hinder the sale or offer for sale of the stocks, bonds and securities of your orator, whether such sale or offer for sale be made by your orator or by any other person whatsoever.

(c) From beginning any action of any nature whatsoever against your orator, its officers, agents and employees, or against any person to prevent or hinder in any way the sale of the stocks, bonds and other securities of your orator in the State of Michigan.

(d) From publishing any information as to the stocks, bonds or other securities of your orator.

(e) From arresting or causing the arresting of any officer, agent or employee of your orator, or any person who may within the State of Michigan sell, offer for sale, take subscriptions for or negotiate for the sale in any manner, or profess to sell any of the stocks, bonds or other securities of your orator.

And that said defendants and each and all of them may be in the meantime so restrained during the pendency of this suit.

And that your orator may have such other relief as may be agreeable to equity and good conscience.

The Weis Fibre Container Corporation,
Per H. A. Consor, Treas.

Beaumont, Smith & Harris,
Solicitors for Plaintiff.

State of Michigan, County of Wayne, ss:

H. A. Consor being duly sworn, deposes and says that he is treasurer of the Weis Fibre Container Corporation, the plaintiff above named, and is acquainted with the facts set forth in the foregoing bill of complaint; that he is duly authorized to sign same and that said bill of complaint is true except as to matters

therein stated to be on his information and belief and as to those he believes it to be true.

H. A. Consor.

Subscribed and sworn to before me this 24th day of August, 1915.

Albert E. Meder,
Notary Public, Wayne County, Michigan.
My commission expires Sept. 4, 1916.

EXHIBIT A.

An Act to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State of Michigan by any dealer, firm, company, association or corporation, foreign or domestic, by requiring an inspection of such stocks, bonds, or other securities and an inspection of the business of such persons, firms, companies, associations or corporations, including dealers and agents, and such regulation and supervision of the business of said persons, firms, companies, associations, or corporations, including dealers and agents, as may be necessary to prevent fraud in the sale within the State, of any stocks, bonds or other securities, and to provide a penalty for the violation thereof, and to repeal act number one hundred forty-three of the Public Acts of nineteen hundred thirteen, approved May two, nineteen hundred thirteen, and all other acts or parts of acts inconsistent herewith.

(Act No. 46, P. A. 1915.)

The People of the State of Michigan enact:

Section 1. There is hereby created a commission to be known as the Michigan Securities Commission and hereafter called in this act "the commission," whose duty it shall be to administer and provide for the enforcement of all the provisions of this act. Said commission shall consist of the Commissioner of the State Banking Department who shall be president thereof; the State Treasurer of the State and the Attorney General of the State, all of whom shall be members of said commission during their respective terms of office and any two of whom shall constitute a quorum. The said commission shall succeed the Michigan securities commission created by act one hundred forty-three of the Public Acts of nineteen hundred thirteen, and as such successors shall receive all of the files, papers and prop-

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erty of said Michigan securities commission created by said act one hundred forty-three of the Public Acts of nineteen hundred thirteen. All proceedings pending before said Michigan securities commission created by said act one hundred forty-three of the Public Acts of nineteen hundred thirteen shall be continued by the commission created by this act; all actions, civil and criminal, pending under said act one hundred forty-three of the Public Acts of nineteen hundred thirteen shall be continued and completed thereunder. Said commission shall have its office in the capitol in the city of Lansing, in rooms to be provided by the Board of State Auditors, and all of its records shall be there kept. It shall hold a regular meeting on the first Friday of each month and may hold special meetings upon the call of the president. It shall keep a complete record of all its meetings, its accounts and the business it transacts. It shall appoint a secretary whose salary shall not exceed the sum of twenty-five hundred dollars per annum and shall have power to employ such other and further assistance as may be necessary to carry out the provisions of this act. All salaries fixed by it shall be subject to the approval of the Board of State Auditors. It shall make such rules and regulations as may be necessary to carry out the provisions of this act and may prepare all necessary blanks to be used in its proceedings and in the conduct of its business.

Sec. 2. Every person, corporation, copartnership, company, or association (except those exempt under the provisions of this act) organized, or which shall hereafter be organized in this state, whether incorporated, or unincorporated, which shall either himself themselves or itself, or by or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, them or it within the State of Michigan, shall be known for the purposes of this act as a domestic investment company. Every such person, corporation, co-partnership or association resident of or organized in any other state, territory or government, shall be known for the purposes of this act as a foreign investment company.

Sec. 3. The provisions of this act shall not apply to (a) securities of the United States, or any foreign government, or of any state or territory thereof, or of any county, city, township, district or other public taxing subdivision of any state or territory of the United

States, or any foreign government; (b) unsecured commercial paper; (c) securities of public or quasi public corporations, the issue of which securities are regulated by the Michigan Railroad Commission or by a public service commission or board of equal authority of any state or territory of the United States or securities senior thereto; (d) securities of state or national banks or trust companies, or building and loan associations of this state; (e) securities of any domestic corporation organized without capital stock and not for pecuniary gain, or exclusively for educational, benevolent, charitable or reformatory purposes; (f) mortgages upon real and personal property situated within this state where the entire mortgage is sold and transferred with the note or notes secured by such mortgages; (g) increase of stock sold and issued to stockholders, also stock dividends; (h) securities which are listed in any standard manual of information approved by said commission. *Provided, however,* That said commission shall have the power to call for additional and further information than that contained in such manuals with reference to any securities listed therein, and may, pending the filing of such information, suspend the sale of such securities, and also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice to the issuer of such securities if said commission shall find that the sale of such securities would work a fraud upon the purchasers thereof; (i) all stocks, bonds and securities approved by the Michigan securities commission created by act one hundred forty-three of the Public Acts of nineteen hundred thirteen.

Sec. 4. Before selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever in this state, any stocks, bonds or other securities of its own issue, every investment company, domestic or foreign, shall file in the office of the commission a statement showing in full detail the plan upon which it proposes to transact business; a copy of all contracts, stocks, bonds or other instruments which it proposes to make with, or sell to, its contributors or customers, together with a copy of its prospectus, and of the proposed advertisements of its sale of stocks, bonds or other securities, which statement shall also show the name and location and main office of the investment company; the names and addresses of its officers, and

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an itemized account of its financial condition and the amount of its assets and liabilities, and such other information touching its conditions and affairs as the commission may require. If such investment company shall be a co-partnership or an unincorporated association it shall also file with the commission a copy of its articles of co-partnership or association, and all other papers pertaining to its organization. If it be a corporation organized under the laws of Michigan it shall also file with the commission a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the commission a copy of the laws of the state, territory or government under which it exists or is incorporated, and also a copy of its charter and the certificate of the proper officer of such state showing that it is authorized to transact business there, and also copies of its constitution and by-laws, and all amendments of any of the above mentioned instruments which have been made, and all other papers pertaining to its organization. It shall also pay a filing fee of one-tenth of one per cent upon the face value of the securities for the sale of which application is made: *Provided, however,* That such filing fee shall not be more than one hundred dollars, nor less than ten dollars.

Sec. 5. All of the above described papers shall be verified by the oath of a member of the co-partnership or company, if it be a co-partnership or company, and by the oath of a duly authorized officer, if it be a corporation or an unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified by the officer of whose records or archives they form a part, as being correct copies of such records or archives.

Sec. 6. Every foreign investment company before offering for sale any of its stocks, bonds or other securities in this state shall also file its irrevocable written consent that suits and actions may be commenced against it in the proper court of any county in this state in which a cause of action may arise or in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of this state, on the Commissioner of the State Banking Department, said consent stipulating and agreeing that such service of

such process or pleadings on such commissioner shall be taken and held in all courts to be as valid and binding as if due service had been made upon the company itself, and said instrument containing such consent shall be authenticated by the seal of said foreign investment company, and by the acknowledged signature of a member of the co-partnership or company, if it be a co-partnership or company, or by the acknowledged signature of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees or managers of the corporation or association, authorizing the secretary and president to execute the same. In case any process or pleadings mentioned in this act are served upon the Commissioner of the State Banking Department, it shall be by duplicate copies, one of which shall be filed in the office of the Michigan Securities Commission and another immediately forwarded by registered mail to the head office of the person or corporation against which said process or pleadings are directed.

Sec. 7. Said application shall be heard by the said commission at the next regular meeting after said application is filed (providing such filing shall precede such monthly meeting by twenty-four hours), or at a special or adjourned meeting of said commission, but if such application is heard at a special or adjourned meeting of said commission the secretary shall give such applicant at least two days' notice of such hearing. Said commission may have power to adjourn such hearings upon such applications from day to day or from time to time.

Sec. 8. The said commission shall have power to demand from any investment company seeking to come under the provisions of this act any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the

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expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and intangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said commission may prescribe. And said commission may withhold its license to sell such stocks, bonds and securities if such corporation has issued stocks, bonds and securities in payment for property, patents, good will, promotion and intangible assets in excess of their value as found by said commission, and said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such commission, or if such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said commission have been surrendered to such corporation and cancelled by it, and until the said stock has been deposited in escrow under the terms prescribed by said commission.

Sec. 9. It shall be the duty of said commission to examine the statements and documents filed in its office by any investment company and the reports of any investigation conducted under the direction of said commission and to hear such applicant and it shall have power to examine under oath any person interested or connected with such investment company, and if said commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser, then said commission shall disapprove the sale of such proposed contracts, stocks, bonds or other securities and shall notify such investment company by registered mail of its findings and disapproval, and it shall be unlawful for such company to do any business in the way of selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever of any such contracts, stocks, bonds and other securities in this State; and said contracts, stocks, bonds and other secur-

ities shall not be sold in this State. If, however, said commission shall not find that the proposed plan of business of said investment company or that its proposed contracts, stocks, bonds or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser thereof, then it shall approve the sale of such stocks in the State of Michigan and issue its certificate in substantially the following language:

"This is to certify that the.....
has this date been given permission to sell $.....of its
.....within the State of
stocks, bonds or securities.
Michigan. The Commission does not recommend the purchase of this security.
Dated.....
In Witness Whereof, I have hereunto affixed the corporate seal of the Michigan Securities Commission.
(SEAL) .....
Secretary."

The words "The commission does not recommend the purchase of this security" shall be printed in type two sizes larger than any other part of said certificate, and in case said certificate or the fact that said commission has approved said security is printed or published in any circular, pamphlet or newspaper, the words "The commission does not recommend the purchase of this security" shall be printed in type two sizes larger than the type in which the statement of fact that such security has been approved by said commission appear.

Sec. 10. Any person, firm, co-partnership, corporation or association whether domestic or foreign, not the issuer, who shall in this State sell or offer for sale any of the stocks, bonds or other securities issued by any foreign or domestic investment company, except the securities specially exempted in this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities, shall be deemed to be a "dealer" in such securities within the meaning of this act, and no dealer within the meaning of this act shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities unless and until he shall have filed a list of the same in the office of the Michigan Securities Commission as in this act provided. The term "dealer" shall not include an owner not issuer of such

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securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust.

Sec. 11. Any dealer desiring to sell or offer for sale within this State any stocks, bonds or other securities not exempted under the terms of this act, shall first register with the Michigan Securities Commission and shall furnish said commission, upon oath, in such form as the commission shall prescribe, the following information, to-wit: The dealer's name, residence and business address, the general character of the securities to be dealt in, the place or places where the business is to be conducted within this State, and where the business in this State is not to be conducted by the dealer in person, then the names and addresses of all the persons in charge thereof. Said dealer shall pay to the commission a fee of fifty dollars and shall furnish said commission with such other information in addition to that above specified as said commission shall deem necessary in order to thoroughly acquaint such commission with the character of the business of said dealer. All authorized agents of any dealer shall be registered with the commission and the name of any agent shall be stricken from the register by the commission upon the written request of the dealer and additional agents may be registered by the commission upon like request of the dealer: Provided, That no agent shall act as such until his name and address shall be registered with the commission. If the dealer shall be a non-resident of this State or a corporation other than a domestic corporation, he shall at the time he registers with the commission, file with the commission a written duly authenticated appointment of the Commissioner of the State Banking Department of this State as his or its agent in Michigan upon whom process or pleadings may be served for and on behalf of the dealer, which appointment shall be irrevocable. Upon compliance by such dealer with the provisions of this act the said commission shall issue to such dealer a license under the seal of said commission and signed by the secretary thereof, which said license shall be good until revoked by said commission for good cause upon notice to such dealer and a hearing duly had: *Provided further,* That said commission shall issue the license provided for in this section to each dealer registered under act one hundred forty three of

the Public Acts of nineteen hundred thirteen upon the payment to said commission of the sum of one dollar, and shall also issue licenses under the terms of this act and upon the payment of the sum of twenty-five cents to such agents as were registered under the provisions of said act number one hundred forty-three of the Public Acts of nineteen hundred thirteen.

Sec. 12. In addition to the filing and examination fees herein provided for to be paid by investment companies and dealers, there shall be charged and collected by said commission a fee of three dollars for the registration and authorization of each agent of any such investment company or dealer and all the fees and charges collected by the commission shall be turned into the State Treasury and are hereby reappropriated to the commission towards paying the expenses of enforcing this act. The expenses of said commission shall not, however, be limited to the moneys received by it, but it shall have the power to incur all expenses it finds necessary in enforcing the provisions hereof.

Sec. 13. General accounts of every investment company, domestic or foreign, shall be kept in a business-like and intelligent manner and in sufficient detail that said commission can ascertain at any time its financial condition and the books of accounts shall at all times during business hours, except on Sundays and legal holidays, be open to stockholders and investors in said company, and the said commission, or its duly authorized representatives, and all such investment companies, shall be subject to examination by said commission or any member thereof, or the clerks, accountants or examiners thereof, at anytime said commission shall deem it advisable, and in the same manner as is now provided for the examination of State banks, and such investment company shall pay a fee for each of such examinations of not to exceed seven dollars for each day or fraction thereof that any member of said commission, clerk, accountant or examiner is absent from the capitol building for the purpose of making such examination and shall also pay the actual traveling and hotel expenses of the person or persons making such examination and the failure or refusal of any investment company to pay such fees, upon demand of such commission clerk, accountant or examiner, while making such examination shall work a forfeiture of the right of such investment company to sell or offer for sale any of its contracts, stocks, bonds or other securities in this State. In case

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of a preliminary examination of any investment company by said commission for the purpose of the ascertainment by said commission as to whether said company shall be permitted to come under the provisions of this act, the fee for such examination shall be the same as in this section provided, and in case it shall be made to appear to the commission from the examination of said investment company after said investment company has been authorized to sell its stocks, bonds and securities that the further sale of said stocks, bonds and other securities would work a fraud upon the purchaser, then said commission may make an order revoking the license of said investment company to sell its stocks, bonds and securities upon notice duly given and a hearing duly had and may, pending such hearing, suspend the right of said investment company to sell its stocks, bonds and securities.

Sec. 14. It shall be unlawful for any investment company or dealer, or representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatever in this State, any stocks, bonds or other securities (except as expressly exempted herein), unless and until said commission has approved thereof and issued its certificate in accordance with the provisions of this act, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statements and papers required to be filed by virtue of the provisions of this act or the rules of the commission. It shall be unlawful for any investment company or dealer, or its or his agents, to issue, circulate or deliver any advertisement, pamphlet, circular, prospectus, or other document in regard to its stocks, bonds or other securities in the State of Michigan differing in any way from the copy filed with said commission as provided by this act. It shall be unlawful for any newspaper published in the State of Michigan to advertise the sale of any stocks, bonds or securities which have not been approved by said commission or which are not exempt under the provisions of this act.

Sec. 15. No dealer within the meaning of this act shall sell or offer for sale within this State any of the stocks, bonds or other securities of any investment company unless such investment company shall have fully complied with all the provisions of this act, nor until said dealer shall have registered with the commission

under the terms of this act: *Provided, however,* That should any dealer desire to sell or offer for sale within this State the stocks, bonds or other securities of an investment company, which has not itself complied with the provisions of this act, said dealer shall make application to said commission for license as hereinbefore provided for applications by investment companies and shall pay the same fee required to be paid by said investment company.

Sec. 16. All information obtained by the commission with reference to any securities and all records of the commission relating thereto shall be open to examination by the public, and it shall be the duty of the commission to preserve such information, and so classify and arrange it as to facilitate examination. The commission may from time to time issue in pamphlet form, or by means of newspaper advertisements or otherwise, any and all information regarding any and all contracts, stocks, bonds or other securities sold or offered for sale within this State which it deems would be of public interest or advantage. All fees herein provided for shall be paid into the State Treasury by the commission upon receipt thereof.

Sec. 17. Nothing in this act shall be construed to repeal or modify any laws giving the State Banking Department of this State control of and supervision over State banks and the business of banking in this State, nor shall any part of this act be construed to repeal or modify laws giving the Commissioner of Insurance of this State control of and supervision over the business of insurance in this State, and those engaged therein.

Sec 18. The commission shall adopt a seal with the words "Michigan Securities Commission" and such design as the commission may prescribe, engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the commission certified by the secretary thereof and authenticated by the seal of said Michigan Securities Commission shall be received in evidence in all courts equally and with like effect as the originals.

Sec. 19. Any person who shall knowingly or wilfully subscribe to or make or cause to be made any false statement or false entry in any book of any investment company, or who shall exhibit any false paper with the intention or for the purpose of deceiving any person authorized to examine into the affairs of said investment company or shall make or publish any false statement of

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the financial condition of said investment company or false statement relating to the contracts, stocks, bonds, or other securities by it issued and offered for sale, shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided.

Sec. 20. The commission shall provide for the furnishing to those who may apply therefor, of any information regarding any investment company or its affairs, which is on file in its office, said commission to charge therefor approximately the cost of preparing such information. All fees collected under the provisions of this act shall be paid into the State treasury on the first day of each and every calendar month, and a complete record of all fees received shall be kept in the office of the commission, and all said fees so turned into the State treasury are hereby re-appropriated to the commission for the purpose of paying salaries and expenses necessary for carrying this act into effect. The members of the commission shall perform the duties imposed upon them and each of them, by the terms of this act, without other compensation than the salaries paid them by the State, but they shall be entitled to receive their actual expenses incurred when absent from the seat of government on business of the commission.

Sec. 21. Every investment company, domestic or foreign, shall file during the month of January in each and every year a detailed statement in such form and containing such information as the commission shall require showing its condition at the close of business on the preceding December thirty-first, and shall at the same time pay a filing fee therefor of one dollar.

Sec. 22. The supreme court upon petition of any person aggrieved may review by certiorari any final order of determination of the commission. The issuance of the writ shall not, however, unless specifically ordered by the court, operate as a stay of proceedings.

Sec. 23. Any person or persons who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be imprisoned in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the court.

Sec. 24. Should the courts of this State declare any section or provision of this act unconstitutional or unauthorized, or in conflict with any other section or pro-

vision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this act.

Sec. 25. Act one hundred forty-three of the Public Acts of nineteen hundred thirteen and all acts or parts of acts in conflict herewith are hereby repealed.

Approved April 9, 1915.

Application must be complete and filed twenty-four hours in advance of meeting.

Form 15—General Application. (Supersedes Form No. 1.) Sheet 1.

Date of Application....Final papers filed....Fee $....

Passed..... Disapproved.....

(Do not write in the above space.)

BEFORE THE MICHIGAN SECURITIES COMMISSION.

In the matter of the application of

Name

.....

Address

.....

No.....

for authority to sell its securities in the State of Michigan under the provisions of Act No. 46, Public Acts of 1915.

The ..... Company of.....hereby makes the following statement to the Michigan Securities Commission:

1. Principal office .....
   Branch offices .....
2. Incorporated under the laws of the state of.....
   .....on the.....day of.....19....
3. Financial statement:

	Authorized	Issued	Subscribed but Not Issued	Unissued
Preferred Stock,	—$.....	$.....	$.....	$.....
Common Stock,	—$.....	$.....	$.....	$.....
Bonds,	—$.....	$.....	$.....	$.....

(If there is any other mortgage indebtedness outstanding, attach schedule of same.)

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Assets	Amount
Real Estate	$
Bill Receivable	
Accounts Receivable	
Cash on Hand	
Cash in Banks	
Stock Subscriptions (Unpaid)	
Other Assets as follows:	
Total	$

Liabilities.	Amount
Common Stock outstanding	$
Common Stock Subscribed but Unissued	
Pref'd Stock outstanding	
Pref'd Stock Subscribed but Unissued	
Bonds outstanding	
Mortgages	
Bills Payable	
Accounts Payable	
Sinking Fund or Reserve	
Surplus	
Other liabilities as follows:	
Total	$

(Total of assets and liabilities should balance.)

(Forward to Sheet 2.)

Sheet 2

4. Statement showing the consideration received from the stock and bonds issued and outstanding to date:

COMMON STOCK.

	No. Shares	*Actual Value	Remarks.
Actual Cash		$	
Notes			
Real Estate			
Plant			
Equipment			
Patents			
Organizing			
Promotion			
Commissions			
Salaries			
Dividends			
Stock Subscriptions (Unpaid)			
Totals		$	

PREFERRED STOCK.

	No. Shares	*Actual Value	Remarks.
Actual Cash		$	
Notes			
Real Estate			
Plant			
Equipment			
Patents			
Organizing			
Promotion			
Commissions			
Salaries			
Dividends			
Stock Subscriptions (Unpaid)			
Totals		$	

BONDS.

	No. Bonds	*Actual Value	Remarks
Actual Cash		$	
Notes			
Real Estate			
Plant			
Equipment			
Patents			
Organizing			
Promotion			
Commissions			
Salaries			
Dividends			
Totals		$	

*This column should specify the actual amount of cash or notes received, or the actual value of real estate, etc., received in exchange for stock and bonds issued, and should correspond with the value at which these different items were given in to the company and carried on the books.

(Forward to Sheet 3.)

Sheet 3.

5. Statement of earnings for five years: (If a new corporation: from date of organization.) Fiscal year ends .....

	19....	19....	19....	19....	19....
Gross,	$.....	$.....	$.....	$.....	$.....
Net,	$.....	$.....	$.....	$.....	$.....

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6. Statement of dividends: (As above.)

	19....	19....	19....	19....	19....
Amount,	$.....	$.....	$.....	$.....	$.....
Rate,	.....%	.....%	.....%	.....%	.....%

7. Real estate, plant and equipment: (Give detailed description and location; give valuation as carried on books, also assessed valuation.)

8. Is the physical property covered by Insurance? If so give amount of policies and issuing companies:

9. Patents: (Give description and attach copy.)

(Forward to Sheet 4.)

Sheet 4.

10. What is the nature of the business now being or to be conducted? Give detailed plans of operation:

11. For what purpose are unissued securities to be sold?

(Attach copies of stock certificates and bonds.)

12. At what price and under what conditions and by whom are such securities to be sold?
(Attach copy of all contracts relative to sale of securities and resolution authorizing same.)
(Attach copy of application or contract from purchaser.)

13. Is it contemplated or probable that the owners of issued securities will offer the same for sale in the course of continued and successive transactions of a similar nature?

14. By whom is the bond issue trusteed?

15. Are the bonds guaranteed?.....If so, by whom and what is the personal worth of the guarantor or guarantees over and above their interest in the company?
(Attach copy of guarantees.)

(Forward to Sheet 5.)

Sheet 5.

16. Date of bonds.....Maturity.....
If bonds are optional, state at what price and provisions for calling:

17. State fully sinking fund provisions

18. Give name and address of attorney approving bond issue and attach copy of opinion hereto.

19. Have the company's books been audited?.....If so, by whom and when was audit made?

(Attach copy of audit hereto.)

20. Attach hereto a complete list of all stockholders, showing number of shares of stock or bonds held by each, value of same, and ACTUAL consideration which was given for same in each instance.

21. Sample copy of all literature or advertising matter MUST be attached.

22. Additional requirements are as follows:
    1. Attach copy of Articles of Incorporation or Charter, which must be certified to by the Secretary of State of the state under whose laws the company is incorporated.
    2. If not organized under the laws of the State of Michigan, attach copy of law under which company was organized.
    3. Attach copy of constitution and by-laws.
    4. Attach any amendments to any of the foregoing.
    5. Attach copy of mortgage or lease.
    6. All foreign companies must file consent that suits and actions may be commenced against it by service on the Commissioner of the State Banking Department. (Sec. 6, Act 46, P. A. 1915.) Blank forms are supplied by the commission.
    7. Filing fee must be computed at the rate of one-tenth of one per cent on face value of UNISSUED securities, minimum fee $10.00, maximum fee $100.00. No application will be considered until the fee is paid.
    8. Attach at least four references as to the character, responsibility and financial standing of each director. Also references as to the company itself. Business address of all references must be given.

(Forward to Sheet 6.)

Sheet 6.

21. The following is a list of the officers of the company:

	Name	Address	Salary per year.
President			
Vice-President			
Secretary			
Treasurer			
General Manager			
Directors:			
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			

Wherefore, in view of the showing herein made, the .....Company of..... does respectfully pray that it be permitted to sell its UNISSUED stocks and bonds in accordance with the provisions of the above mentioned law.

In Testimony Whereof We have hereunto set our hands and affixed the official seal of this company, this .....day of.....191...

.....
Company.

(Seals) By.....
President.

Attest.....
Secretary.

State of....., County of....., ss:
.....President, and.....
Secretary of the.....Company, of
.....of lawful age, being first duly sworn, depose and say that they have each read the foregoing application and know the contents thereof, and that the statements and allegations therein contained and attached are true.

.....
President.

.....
Secretary.

Subscribed and sworn to before me this the.....
day of.....191..

.....

Notary Public.

My commission expires.....

(See that CORPORATE SEAL is affixed.)

Form No. 9.

.....

..... File No.....

.....

(Do Not Write in this Space.)

.....

.....

To The Michigan Securities Commission,
Lansing Michigan.

Sirs:

The undersigned, having made application to sell its securities in the State of Michigan, hereby desire to register the following as its duly authorized agents in said state, as provided for in Sec. 10 and 11, Act 46, Public Acts of 1915.

.....

Do not write in this space.

Name of Agent.	Address.	File No.

Enclosed find.....for $.....in payment of registration as above (fee, $3.00 each).

Very respectfully,

.....

.....

Dated at.....
on .....

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Form No. 2.

MICHIGAN SECURITIES COMMISSION.

Consent Under Section 6, Act 46, Public Acts 1915.

Known All Men By These Presents:

That the..... of ....., a corporation incorporated and doing business under and by virtue of the laws of the State of.....and for the purpose of complying with the provisions of Section 6 of Act No. 46, Public Acts of 1915 of the State of Michigan, does hereby and herein make and give its consent that suits and actions may be commenced against it in the proper court of any county in said State of Michigan in which a cause of action may arise against it or in which the plaintiff in said action may reside, by the service of any process or pleadings authorized by the laws of said State of Michigan on the Commissioner of the State Banking Department of said State of Michigan. It is hereby stiuplated and agreed on the part of said corporation that such service of such process or pleadings on such Commissioner shall be taken and held in all courts to be as valid and binding as if due service had been made upon such corporation itself.

The consent herein given shall be deemed to be and is irrevocable.

In Witness Whereof, the said corporation has hereunto affixed its seal and signature in accordance with the resolution of the Board of Directors thereof authorizing the same.

.....(L. S.)

By.....(L. S.)

(Seal) President.

.....(L. S.)

Secretary.

State of.....)
) ss.
County of.....)

On this.....day of.....A. D., 191....., personally appeared before me, a notary public in and for said county and State,..... and ..... who are both known to me to be the persons whose signatures are attached to the foregoing instrument and who each acknowledged the same to be his act and deed, and

the act and deed of the corporation for which each said person purports to act.

.....

Notary Public.

My commission expires.....

(Attach hereto duly certified copy of the resolution of the board of directors authorizing the above.)

Form No. 3.

MICHIGAN SECURITIES COMMISSION.

Appointment of Commissioner of State Banking Department of Michigan as Agent or Dealer to Accept Service of Process or Pleading.

(Sec. 11, Act 46, Public Acts 1915.)

Be It Known By These Presents that I, ...
.....of the City (or Village) of.....
State of..... do hereby appiont the Commissioner of the State Banking Department of the State of Michigan as my agent in said State of Michigan upon whom process or pleading may be served for and on my behalf as a dealer within the meaning of Act No. 46, P. A. 1915 of said State of Michigan. Such appointment shall be deemed to be and is irrevocable.

Sealed with my hand and seal this.....day of .....191...

.....

Dealer.

State of.....}
County of.....} ss.

On this.....day of.....A. D., 191..., appeared before me, a notary public in and for said county and State,.....
to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

.....

Notary Public.

My commission expires.....

(If a corporation certified copy of resolution authorizing the foregoing must be attached.)

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Form No. 5. Dealer's Application No.....

To the Michigan Securities Commission.
Lansing, Michigan.

Sirs:—

The undersigned hereby desire.. to be registered with the Michigan Securities Commission as a DEALER in stocks, bonds and other securities, under the provisions of Act No. 46, Public Acts of 1915, and for your information make the following statements:

1. Name (in full)
2. Business address
3. Residence (if individual)
4. If corporation, copartnership or association, give names and addresses of partners or stockholders.

Partners or Stockholders	Residence.	No. of Shares.

5. If corporation, give date and place of organization .....

6. If copartnership doing business in this state under an assumed name, state if you have filed certificate with county clerk as provided for in Act No. 101, Public Acts of 1907.

Give name of county and date certificate was filed .....

7. The following is a detailed description of the securities dealt in: (Securities exempted under the provisions of Sec. 3, Act 46 Public Acts of 1915, or those listed by the Standard Statistics Bureau's Stock and Bond Services, Poor's Manual of Railroads, Poor's Manual of Public Utilities and Poor's Manual of Industrials, Moody's Manual of Railroads and Corporation Securities, Michigan Manual of Corporation Statistics, Annual Financial Review-Canadian, Supplements to any of the above Manuals, need not be described.)

8. Until further notice.....hereby desire to register the following as.....duly authorized agents:

Name	Address.

Enclosed and will find.....for $.....to cover registration as DEALER (fee $50.00) and AGENTS' registration (fee $3.00 each).

.....certify that the foregoing statements are true and ....agree that.....will not sell or offer for sale any stocks, bonds or other securities unless the same comply with all the provisions of Act No. 46 Public

Acts of 1915, and in testimony thereof,.....have hereunto subscribed.....name and affixed.....seal this .....day of ....., 19....

.....(L. S.)
.....(L. S.)

Witness:

.....

N. B.—Non-resident dealers must file with the commission a duly authenticated appointment of the Commissioner of the State Banking Department of this State as his or its agent in Michigan upon whom process or pleadings may be served for and on behalf of the dealer, which appointment shall be irrevocable.

(Blanks for the foregoing will be supplied by the commission.)

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the within bill of complaint on the therein named Grant Fellows by handing to and leaving a copy thereof with him personally at Lansing in said District on the 4th day of September, A. D. 1915.

Henry Behrendt,
U. S. Marshal.

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the within bill of complaint on the therein named Frank W. Merrick by handing to and leaving a true copy thereof with him personally at Lansing in said District on the 8th day of September, A. D. 1915.

Henry Behrendt,
U. S. Marshal.

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the within bill of complaint on the therein named John W. Haarer

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by handing to and leaving a copy thereof with him personally at Lansing in said District on the 7th day of September, A. D. 1915.

Henry Behrendt,
U. S. Marshal.

CHANCERY SUBPOENA.

(Filed September 14, 1915.)

District Court of the United States of America for the Sixth Circuit and Eastern District of Michigan. Sitting in Chancery.

The President of the United States of America,

To Frank W. Merrick, Commissioner of Banking of the State of Michigan, Lansing; John W. Haarer, Treasurer of the State of Michigan, of Lansing; and Grant Fellows, Attorney General of the State of Michigan, residing at Hudson, Michigan, said three above named parties constitute the Michigan Securities Commission, citizens of the State and residents of the Eastern District of Michigan.

You are hereby commanded to be and appear in the District Court of the United States of America for the Sixth Circuit and Eastern District of Michigan, sitting in Chancery, before the Judges thereof, at the District Court Room, in the City of Detroit, Michigan, within twenty days from the date hereof, then and there to answer unto a Bill of Complaint exhibited against you as defendants by The Weis Fibre Container Corporation, a corporation organized and existing under the laws of the State of South Dakota, with its principal place of business in the City of Huron, South Dakota, as Complainant. And this you shall in no wise omit under the penalty of One Thousand Dollars.

Witness. The Hon. Arthur J. Tuttle, United States District Judge for the Eastern District of Michigan, this twenty-eighth day of August in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and fortieth.

Elmer W. Voorheis, Clerk.
By Carrie Davison, Deputy.

Memorandum.—The above named defendants are required to file their answer or other defense in this suit with the Clerk of this Court, at his office in the City of Detroit, Michigan, on or before twenty days after service of this Writ of Subpoena, excluding the day of service thereof, otherwise the Bill of Complaint may be taken pro confesso against said defendant.

Elmer W. Voorheis, Clerk.
By Carrie Davison, Deputy.

A True Copy.
Attest:.....United States Marshal, by .....Deputy.

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed Chancery Subpoena on the therein named Grant Fellows by handing to and leaving a true and correct copy thereof with him personally at Lansing in said District on the 4th day of September, A. D. 1915.

Henry Behrendt, U. S. Marshal.

RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed Chancery Subpoena on the therein named John W. Haarer by handing to and leaving a true and correct copy thereof with him personally at Lansing in said District on the 7th day of September, A. D. 1915.

Henry Behrendt, U. S. Marshal.

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RETURN ON SERVICE OF WRIT.
(Filed Sept. 14, 1915.)

United States of America, Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed Chancery Subpoena on the therein named Frank W. Merrick by handing to and leaving a true and correct copy thereof with him personally at Lansing in said District on the 8th day of September, A. D. 1915.

Henry Behrendt, U. S. Marshal.

ORDER TO SHOW CAUSE IN CASE No. 131.
(Entered Sept. 3, 1915, by Judge Arthur J. Tuttle.)

Upon reading the Bill of Complaint in the above entitled causes and the affidavit filed therewith, and on motion of Beaumont, Smith & Harris, Solicitors for the plaintiffs, it is hereby ordered this 3rd day of September, 1915, that the defendants show cause, if any they have, before the Judge of the District Court of the Eastern District of Michigan, Southern Division, on the 13th day of September, 1915, at ten o'clock A. M., or as soon as counsel can be heard why a temporary injunction should not be issued pursuant to the prayer of the bill.

Arthur J. Tuttle,
District Judge.

(The Order to Show Cause in Case No. 132 is the same as in Case No. 131, as appears above.)

RESTRAINING ORDER ENTERED IN CASE No. 131 AND 132.

(Entered Sept. 3, 1915, by Judge Arthur J. Tuttle.)

Whereas, in the above entitled causes, bills have been filed praying for the issuance of a preliminary Writ of Injunction, and application has been made to this Court therefor, and an order to show cause has been duly made, returnable on the 13th day of September, 1915, at ten o'clock in the forenoon in the Federal Building in the City of Detroit, Michigan; and it having been made to appear that there is danger of irreparable injury being caused to the plaintiffs before the hearing on said application for a writ of injunction unless the defendants are, pending such hearing, restrained as herein set forth.

Now, Therefore, take notice that you, the said defendants herein, your agents and employees, and each of you are hereby especially restrained and enjoined until the hearing as above set forth from

(a) Enforcing and attempting to enforce any of the provisions of said Act 46 of the Public Acts of 1915, against the plaintiffs herein, and

(b) From hindering in any way whatsoever the sale or offer for sale of the stocks, bonds and other securities by said plaintiffs, whether such sale or offer for sale be made by said plaintiffs or by their agents or employees.

(c) From beginning any action of any nature whatsoever against said plaintiffs, their agents and employees, or against any other persons, to prevent or hinder in any way the sale of the stocks, bonds and other securities dealt in by said plaintiffs in the State of Michigan.

(d) From publishing any information as to the stocks, bonds or other securities so dealt in by said plaintiffs.

(e) From arresting or causing the arrest of said plaintiffs or any agent or employee of said plaintiffs or any person who may within the State of Michigan sell, offer for sale or profess to sell for or in behalf of the plaintiffs any of the stocks, bonds or other securities of said investment companies.

Arthur J. Tuttle,
District Judge.

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ORDER OF APPEARANCE IN CASE No. 131.
(Filed Sept. 9, 1915.)

On motion of Grant Fellows, Attorney General, it is ordered that the appearance of said defendants be, and the same hereby is entered in the above entitled cause.

Dated September 8th, 1915.

Grant Fellows,
Attorney General.

(The Order of Appearance in case No. 132 is the same as in case No. 131, appearing above.)

ORDER CONTINUING RESTRAINING ORDER, ENTERED IN CASES No. 131 AND 132.
(Entered September 13, 1915, by Judge Arthur J. Tuttle.)

The solicitors for the respective parties to the above entitled cause, having consented thereto, it is hereby ordered that the restraining order heretofore entered therein shall stand in full force, and effect, to and until the 25th day of October 1915.

Arthur J. Tuttle,
District Judge.

PETITION OF OTIS & COMPANY FOR INTERVENTION IN THE ABOVE ENTITLED CAUSE.

(Filed September 16, 1915.)

To the Honorable, the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

Otis & Company files this its petition for intervention in the above entitled cause and shows as follows:

1. That said petitioner is and has been for a long time past a partnership organized and existing under the laws of the State of Ohio, and having its principal office and principal place of business at Cleveland, Ohio. That it is composed of Charles A. Otis, a resident of Cleveland, Ohio, William A. Otis, a resident of Colorado Springs, Colorado, Merwin C. Harvey and George W. York residents of Cleveland, Ohio.

2. That said petitioning company is engaged in the business of buying and selling bonds and other securities and has been engaged in the business of offering said bonds and other securities for sale in the State of Michigan. That certain of said bonds and other securities so offered for sale by it in Michigan are bonds and securities the issue and sale of which is regulated by Act 46 of the Public Acts of 1915, and that said petitioner has by advertisement and otherwise professed the business of selling and offering for sale such securities in Michigan and has been engaged in such business in said State of Michigan, and that the sales that it has made in Michigan are in the course of continued and successive transactions of similar nature, and said petitioner has not in making such sales acted in a trust capacity created by law.

3. That your petitioner has been engaged in said business of buying and selling securities for considerable period of time, and it has invested in said business large sums of money and has from time to time acquired stock, bonds and other securities of great value and now owns certain of said bonds and securities, and that it has likewise contracted from time to time to sell bonds and securities of the kind above described for the owners thereof and the issuers thereof. That in the course of its business it has spent large sums of money in the establishment and advertising of said business and has acquired a valuable good will and extensive clientele in the State of Michigan. That it has acquired valuable

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information as to the names and addresses of persons and firms and corporations which purchase securities of the character above described and certain of such firms and corporations reside in the State of Michigan.

That the representations it makes as to the value of the securities are truthful representations based upon all the information that petitioner is able to gather and upon the judgment of its officers and experts in the valuation of the several kinds of properties upon which said securities are a lien, or which are owned by the corporations which issue capital stock so offered for sale by your petitioner.

4. That it sends into the State of Michigan agents and employees who there solicit the sale of certain of such securities and transmits such orders to the office of your petitioner in the City of Cleveland, Ohio, that thereafter a delivery of such securities is made by said petitioner in interstate commerce to the purchaser thereof in the State of Michigan.

5. Said petitioner further shows that on the 25th day of August, 1915, N. W. Halsey & Company, the Continental & Commercial Trust & Savings Bank Company, H. L. Higginson, et al., Arthur B. Leach, et al., filed their bill of complaint in the said Eastern District of Michigan, Southern Division, reciting in substance that they were engaged either in the issue or sale of stocks, bonds and securities of the character such as were described in said Act 46 of Public Acts of 1915; that they were engaged in the business of offering such stocks, bonds and securities for sale within the State of Michigan; that they were owners of certain of said stocks and bonds and had contracted to sell such securities and had invested large sums of money in connection therewith; that they were engaged in interstate commerce in the State of Michigan in and about the sale of said securities; and that thew were being solicited to sell such securities in Michigan, but that they had been informed that such securities could not be sold in Michigan except in compliance with said Act 46 of the Public Acts of 1915.

6. That the said bill of complaint further recited in substance that the provisions of said Act 46 as set forth in detail the acts of the Michigan Securities Commission, created by said Act 46, and and about the enforcement of said Act. That said bill of complaint likewise charged

that the said acts of said Michigan Securities Commission were wrongful and injurious to the plaintiffs; that it likewise charged that said Act 46 was unconstitutional and void and set forth in detail the reasons for said allegation, and that it concluded with the prayer that the said Act 46 be decreed to be unconstitutional and void and that defendants be restrained from enforcing same in any way whatsoever.

7. Your petitioner charges that the several allegations in the bill of complaint filed by said several plaintiffs, who were dealers in stocks, bond and other securities, are true as to your petitioner; that it is engaged in a similar business and that in all respects its situation is identical with the said plaintiffs; and that it is entitled to the relief prayed for by the said plaintiffs in their bills of complaint.

8. Your petitioner further charges the fact to be that said Act 46 is unconstitutional and void as set forth in said original bill of complaint. That the regulations and requirements promulgated by the said Michigan Securities Commission, as recited in said bills of complaint, are likewise unreasonable and void and threatens to cause, and are now causing your petitioner serious damage and loss, and that immediate and irreparable injury will be caused to your petitioner by reason of the enforcement of said act, and particularly by the fact that your petitioner, its agent and employees will be prevented from transacting its said business in the State of Michigan, or selling its said securities there, or delivering the securities it has already agreed to deliver there, unless done in compliance with said act, and will be entirely prevented from doing any of said business within the said State of Michigan for a possible period of thirty days after listing same, even of your petitioner should endeavor to comply with the provisions of said act.

9. Your petitioner further shows that on the filing of said bill of complaint in the above entitled cause, an order was duly made therein that the said defendants show cause upon a certain day why a preliminary injunction should not issue, as prayed in said bill of complaint; that thereafter by agreement a restraining order was duly entered restraining the said defendants from enforcing or attempting to enforce any of the provisions of said Act 46, as prayed in said bills of complaint.

10. Your petitioner further shows that its situation in all respects being identical to that of said plain-

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tiffs in said cause, it should be permitted to intervene therein, and it should have the benefit of the restraining order heretofore issued in said cause and such other relief as shall hereafter be granted therein.

11. Your petitioner further shows that great and irreparable injury will result if it is not permitted to intervene in said cause and if the benefit of said order, and the defendants are permitted to attempt to enforce the provisions of the said invalid and void act as against your petitioner, the co-partners therein, and its agents and attorneys. That it has a standing expense by way of salaries and other expenses in connection with its representation in the State of Michigan to the amount of at least $300.00 per month. That should your petitioner be compelled to cease doing business in Michigan until final decree in said cause, it would lose the amount of said expense and additional expense thereto necessary to maintain its salesman and representative during that period. That the gross expense and loss which would be cause to it would be at least the sum of $300.00 per month. That your petitioner in its business in Michigan disposes of approximately $20,000.00 par value of securities each month and earns thereon a substantial profit. That such profit would likewise be lost to your petitioner if it is prevented by the operation of said statute and the enforcement thereof by said defendants herein continuing its said business in Michigan.

Therefore, your petitioner prays that it be made a party plaintiff in said cause and may be allowed to intervene therein and may have the benefit of such restraining order and such other and further relief as to the court shall seem meet.

Otis & Co
By Merwin C. Harvey.

State of Ohio,
County of Cuyahoga, ss:

Before me this 15th day of September, 1915, personally came Merwin C. Harvey, who being duly sworn deposes and says that he is one of the partners of said Otis & Company, that he executed the foregoing petition for and on behalf of said Otis & Company, being authorized so to do, and that he knows the facts therein set forth and that they are true of his own knowledge.

C. P. Rockword,
(Notarial Seal.) Notary Public, Cuyahoga County, O.
My Commission expires Jan. 18, 1917.

DEMURRER AND MOTION TO DISMISS BILL OF COMPLAINT FILED IN CASES No. 131 AND 132.

(Filed Nov. 13, 1915.)

Now comes the above named defendants, Frank W. Merrick, John W. Haarer and Grant Fellows, constituting the Michigan Securities Commission, created under Act number 46 of the Public Acts of 1915, and move the court to dismiss the bill of complaint filed by the plaintiffs herein for the following, among other reasons:

I.

The said court is without jurisdiction in said cause.

II.

The said bill is to restrain criminal prosecutions under a criminal satute of the State of Michigan and no other or further relief can be granted by this court upon said bill. The bill, therefore, is without equity and the court without jurisdiction.

III.

The said plaintiffs has a full, perfect and complete remedy upon the law side of the court.

IV.

The bill of complaint does not state such a cause of action as entitles the said plaintiffs to relief in a Court of Equity.

V.

That the law under and by virtue of which the defendants claim to act, as set forth in said bill of complaint, namely, Act 46 of the Public Acts of 1915, is in all regards constitutional.

VI.

Because said Act number 46 of the Public Acts of 1915 is a valid exercise of the police power of the State and in no regard infringes any rights of the said plaintiffs under the State or the Federal Constitution.

VII.

Because said plaintiffs has not shown any irreparable injury, or any injury to them, or either of them, by the

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enforcement of the provisions of said Act number 46 of the Public Acts of 1915.

VIII.

Because said plaintiffs have shown by their said bill that the only injury which could result to them would be by and through a criminal prosecution brought by the duly accredited officers of the State of Michigan.

IX.

Because said bill does not show any threatened injury to the said plaintiff justifying the filing of a bill in equity.

X.

Because said suit is a suit against the State of Michigan.

Wherefore, these defendants move the court to dismiss said bill and to discharge the restraining order heretofore issued against these defendants.

Grant Fellows,
Attorney General, Solicitor for defendants.

RULES 22 AND 23, MICHIGAN SECURITIES COMMISSION. BULLETIN NO. 3, ISSUED AUGUST 24, 1915.

(Filed Feb. 7, 1916.)

22. Regular meetings of the Michigan Securities Commission will be held at its offices in the Capitol, at Lansing, Mich., on each Friday at nine o'clock A. M. No application will be considered unless complete and filed by nine o'clock A. M. of the preceding day.

23. Special meetings shall be held at the same place upon the call of the Chairman of the Michigan Securities Commission.

AFFIDAVIT OF FRANK W. MERRICK, JOHN W. HAARER AND GRANT FELLOWS, FILED IN CASES No. 131 AND 132.

(Filed Nov. 13, 1915.)

Ingham County, ss:

Frank W. Merrick, John W. Haarer and Grant Fellows being duly sworn depose and say, and each for himself doth depose and say: That he, the said Frank W. Merrick, is the Commissioner of Banking of the State of Michigan; that he, the said John W. Haarer, is the State Treasurer of the State of Michigan, and that he, the said Grant Fellows, is the Attorney General of the State of Michigan, and that they constitute the Michigan Securities Commission created by Act number 46 of the Public Acts of 1915, and have been acting as such Michigan Securities Commission since said Act took effect.

Deponents further say that the Manuals which have been approved by them under the terms and provisions of said Act are each and all of them standard manuals of information and are such manuals as are in use by the bankers and investment public of the State of Michigan.

Deponents further say that said Commission is a subscriber to reporting agencies and obtain and receive reports from such reporting agencies; but that none of said reporting agencies, nor the reports of said reporting agencies are treated and regarded as manuals, and that the companies reported in such reporting agencies are not automatically approved by said Commission; nor are the stocks, bonds or other securities reported by such reporting agencies regarded by said Commission as exempt under the provisions of said Act, but that such reporting agencies are used by said Commission to get information in the same manner and in no other manner than such reporting agencies are used by business houses who are subscribers thereto.

Deponents further say that the said Commission has not at any time issued in pamphlet form, or by means of newspaper advertisements, or otherwise, any information or statement with reference to any of the contracts, stocks, bonds or other securities sold or offered for sale by the plaintiffs, in this case or any of the interveners herein; nor have deponents, or any of them, ever threatened to do so; nor have these deponents, nor has said

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Commission, any intention of so doing, and further deponents say not.

F. W. Merrick,
John W. Haarer,
Grant Fellows.

Subscribed and sworn to before me, this 12th day of November, 1915.

Willard M. Cornelius,
Notary Public, Lenawee County, Michigan.
My Commission expires March 12, 1919.

ORDER CONTINUING RESTRAINING ORDER UNTIL THE DISPOSITION OF MOTION FOR INJUNCTION.

(Entered Nov. 29, 1915, by Circuit Judge Denison and District Judges Sessions and Tuttle.)

The motion for preliminary injunction having come on to be heard before a court composed of Circuit Judge Denison and District Judges Session and Tuttle, heretofore duly constituted to hear such matters pursuant to Section 266 of the Judicial Code, and such motion having been duly argued before such three Judges on the 13th day of November, and they having filed in this cause their approval draft or journal entry, it is now, in pursuance of such written approval, ordered as follows:

That the restraining order heretofore issued be continued in force until disposition by the court of the motion for preliminary injunction now submitted.

That each petitioner who has been allowed to intervene herein and each petitioner who shall be allowed to intervene herein pending the disposition of the motion for injunction, is entitled to the benefit of the restraining order in force to the same extent as if such petitioner were named as one of the complainants in the case; that the defendants be, and each of them is, until the disposition of such motion, restrained with reference to the securities and business of each intervenor who has been

or who may be permitted to intervene, and in the same manner and to the same extent as specified in the existing restraining order with reference to the business and securities of the complainants; and that subsequent application for intervention be heard and decided by the District Judge according to the merits of each application.

(Sgd.) A. C. Denison,
Circuit Judge.
(Sgd.) C. W. Sessions,
District Judge.
(Sgd.) Arthur J. Tuttle,
District Judge.

OPINION ON MOTION FOR PRELIMINARY INJUNCTION IN CASES No. 131-132.

(Filed Dec. 30, 1915.)

On motion for preliminary injunction against enforcement of "Michigan Blue Sky Law of 1915." Heard before Dennison, Circuit Judge, and Sessions and Tuttle, District Judges, pursuant to #266 of the Judicial Code. Per Curiam:

Two years ago, the same three judges, now sitting, considered the Michigan "Blue Sky Law" of 1913, and for the reasons stated in Alabama Co. vs. Doyle, 210 Fed., 173, held it invalid. No appeal was taken, but the Legislature of 1915 passed the substitute law which is now before us (Act No. 46, P. A., 1915). By the two pending bills and the various interventions, injunctions against the law's enforcement are sought by an issuing corporation and by corporate, partnership and individual dealers, all citizens of other states; and thus the law's validity is challenged by every kind of nonresident interest.

We do not doubt the jurisdiction of the court. See *Ex parte Young*, 209 U. S., 123; *Traux vs. Raich*, S. C. U. S., Nov. 1, 1915; *Phoenix Co. vs. Geary*, S. C. U. S., Nov. 29, 1915; *Michigan vs. Baird*, 173 Mich., 655; *Nolen vs. Reichman* (D. C. Tenn.), 225 Fed., 813.

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It is not important to go over the same ground as before. Our conclusions then announced have been more or less completely approved: In the Eighth Circuit, by Judges Smith, McPherson and Pollock (*Compton vs. Allen.* 216 Fed., 537;) in the Fourth, by Judges Pritchard and Dayton,—Judge Woods dissenting, but not on these points (*Bracey vs. Darst,* 218 Fed., 482); and in the Eighth, again, by Judges Sanborn, T. C. Munger and Elliott (*Sioux Falls Co. vs. Caldwell, Attorney General of South Dakota,* Nov. 18, 1915.)

The only question now open is whether the differences between the laws of 1913 and 1915 justify any different result as to the latter. We think not, because we find no substantial change in those respects which were held to be fatal. Some minor details have been corrected, but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power.

The 1913 law suspended all deals for 30 days, and then, lacking actual objection, automatically withdrew legal objections. The new law forbids all dealings until after affirmative approval by the Commission. This approval would not, normally, be obtainable for several days, and it may be indefinitely withheld, without objection made or reason given, but at the mere convenience of the Commission. This change in the law has not diminished this burden, in directness or in weight.

Under the 1913 act, sales were to be forbidden, if the Commission finds that the plan of business is unfair or that the securities (a) are fraudulent, (b) will, in all probability, work a fraud upon the purchaser, or (c) will, in all probability, result in a loss to the purchaser. The 1915 act in terms seems to eliminate the tests of unfairness and of probable loss, but in fact provides for disapproval, if the Commission finds "that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would, in the opinion of said Commission, work a fraud upon the purchaser" (#9). Has there been any substantial change, or has the omission of the words "unfair" and "loss" left the statute unchanged in true intent and meaning? Obviously, the statute is now content to rest the Commission's condemnation alone on the fraudulent character of plan or securities. They must also meet the ad-

ditional test whether, "in the opinion of the Commission," the sale of the securities would "work a fraud upon the purchaser." To "work a fraud upon the purchaser" must be something different from being "fraudulent;" and the clause would seem to be difficult of interpretation save for the aid given by the history of the statute and by an additional section which first appears in the new law. This is #8, copied in the margin.* It

*#8. The said commission shall have power to demand from any investment company seeking to come under the provisions of this act any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and tangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said commission may prescribe. And said commission may withhold its license to sell such stocks, bonds and securities if such corporation has issued stocks, bonds and securities in payment for property, patents, good will, promotion and intangible assets in excess of their value as found by said commission or if said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such commission until such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said commission have been surrendered to such corporation and cancelled by it, and until said stock has been deposited in escrow under the terms prescribed by said commission.

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provides in substance that the Commission may, by its own experts and physical examination determine the value of the property involved and may prohibit the sale, unless all securities in excess of the value so determined are surrendered to the Commission; which plainly means that the Commission is, directly or indirectly, to fix the price at which securities may be sold. When this provision is read in connection with the general rule of prohibition in #9, it is clear enough that "in the opinion of said Commission work a fraud upon the purchaser" means "in the opinion of said Commission will in all probability result in loss to the purchaser;" and no real change in the meaning has been accomplished.

The burden of examination imposed by #8 need only be noticed to be appreciated. There is no limit to either the time which may be consumed or the amount of expense which may be imposed; and from the whole statute, the conclusion that interstate dealings in legitimate securities is forbidden, save at the practically unregulated discretion of an administrative board, seems to us entirely clear.

The fees to be paid, the delays imposed, and the large, often very large, expense involved in furnishing information and conducting examinations amount to a practical prohibition of all small dealings, and they emphasize the directness and extent of the restrictions placed on all interstate commerce in these securities.

Several serious objections to the validity of the law are urged in addition to those passed upon in our former opinion; but it is unnecessary to consider them.

The preliminary injunctions prayed for should issue; but each complainant or intervenor, before an injunction may be issued for his benefit, must give a bond to the state conditioned that in case the law should ultimately be held valid, he will pay all fees and charges required by the act. The penalty and the detailed form of all such bonds shall be as from time to time determined by the Judge of this District.

Per Curiam:

(Sgd.) A. C. Denison,
Circuit Judge.

(Sgd.) C. W. Sessions,
District Judge.

(Sgd.) Arthur J. Tuttle,
District Judge.

ORDER GRANTING PRELIMINARY INJUNCTION CONDITIONALLY, ENTERED IN CASES No. 131 AND 132.

(Entered Dec. 30, 1915, by Circuit Judge Denison and District Judges Sessions and Tuttle.)

In the above entitled cause, the motion for preliminary injunction having come on to be heard before a court composed of Circuit Judge Denison and District Judges Sessions and Tuttle heretofore duly constituted to hear such matter pursuant to §266 of the Judicial Code, and such motion having been duly argued before such three judges and they having filed in this cause their written conclusion and opinion thereon, it is now, in pursuance of such opinion, ordered as follows:

1. That until the further order of the court, the defendants, their agents and employes and the agents and employees of the Michigan Securities Commission be enjoined and restrained from enforcing or attempting to enforce against any of the plaintiffs or its officers, agents or employees any of the provisions of Act No. 46 of the Michigan Public Acts of 1915, and from beginning or instigating any action, civil or criminal, against the plaintiffs or any of their agents or employees, based upon or pursuant to such act; and that a provisional writ of injunction issue accordingly.

2. That a similar writ of injunction pending the further order of the court be allowed and issued to each intervenor herein, including such as shall, pending the cause, be hereafter allowed to intervene; and that each subsequent application for intervention be heard and decided by the District Judge according to the merits of such application.

3. Before any injunction issues to any plaintiff or to any intervenor, he must give a bond to the State of Michigan conditioned that in case the law shall be ultimately held valid he will pay all fees and charges required by the act and which would have accrued against him if the law had been in force. The penalty and the detailed form and condition of each such bond shall be from time to time determined by the Judge of this District.

Approved for entry this 30th day of December, 1915.

A. C. Denison, Circuit Judge.
C. W. Sessions, District Judge.
Arthur J. Tuttle, District Judge.

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FORM OF BOND PRESENTED PURSUANT TO ORDERS GRANTING PRELIMINARY INJUNCTION AND APPROVAL OF THE COURT.

(Approved and Entered Jan'y 17, 1916, by Judge Tuttle.)

(Case 131).

In the above entitled cause counsel for plaintiffs having presented to the court for its approval a form of bond to be filed by each of the plaintiffs and each of the intervenors herein, and by all who may be subsequently permitted to intervene, and in accordance with an order of the court entered herein on the 30th day of December, A. D. 1915; and arguments of counsel for plaintiffs and defendants having been heard; and counsel having consented thereto, on motion of Beaumont Smith and Harris, attorneys for plaintiffs, it is ORDERED that the following form of bond be, and the same hereby is, approved, as to its penalty, detailed form and condition:

(Case 132).

In the above entitled cause counsel for plaintiff having presented to the court for its approval a form of bond to be filed by the plaintiff and each present and subsequent intervenor in accordance with an order of the court entered herein on the 30th day of December, A. D. 1915; and arguments of counsel for plaintiffs and defendants having been heard; and counsel having consented thereto, on motion of Beaumont, Smith & Harris, attorneys for plaintiffs, it is Ordered that the following form of bond be, and the same hereby is, approved, as to its penalty, detailed form and condition:

Know All Men By These Presents, that we.....

....

(hereinafter called the Principal) as Principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and duly authorized to do business in the State of Michigan, (hereinafter called the Surety) as Surety, are held and firmly bound unto the People of the State of Michigan in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America, to be paid to the said People of the State of Michigan, or to the authorized representatives of the said People of the State of Michigan, to which payment well and

truly to be made we bind ourselves, our successors, and assigns and each and every of them firmly by these presents.

Sealed with our seal, dated the ..... day of January, A. D. 1916.

The Condition Of This Obligation Is Such, that if the said Principal, one of the..... in the above entitled cause, shall well and truly pay to the said People of the State of Michigan, or to the authorized representatives of the said People of the State of Michigan, all fees and charges required by Act No. 46, Public Acts, Michigan, 1915, and which would have accrued against him if the law had been in force in case said law be ultimately held valid in the above entitled cause, then this obligation is to be void, otherwise to remain in full force.

.....(Seal)
.....(Seal)
Arthur J. Tuttle,
District Judge.

INJUNCTION.
(Filed Jan'y 31st, 1916).

United States of America.
The District Court of the United States for the Eastern District of Michigan, In Equity.
The President of the United States of America.

To Frank W. Merrick, John W. Haarer and Grant Fellows, their agents and employees and the agents and employees of the Michigan Securities Commission, Greeting:

Whereas it has been represented to us, in the District Court of the United States for the Eastern District of Michigan, In Equity, on the part of Superior Life

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Insurance Co., an Illinois Corporation, Plaintiff, that it has lately exhibited its bill of complaint against you, the said Frank W. Merrick, John W. Haarer and Grant Fellows, Defendants, to be relieved touching the matters therein complained of; in which Bill it is stated among other things that you are injuring the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we therefore, in consideration thereof, and of the particular matters in the said bill and the record set forth, do strictly command you, the said Frank W. Merrick, John W. Haarer and Grant Fellows, and the persons before mentioned and each and every of you, under the penalty of Ten Thousand Dollars, to be levied on your lands, goods and chattels, to our use and disposition, that you absolutely desist and refrain from directly or indirectly enforcing or attempting to enforce against the plaintiff or its officers, agents, or employees any of the provisions of Act No. 46 of the Michigan Public Act of 1915, and from beginning or instituting any action, civil or criminal against the plaintiff or any of its agents or employees, based upon or pursuant to such act, until the further order of the court.

Witness, The Honorable Arthur J. Tuttle, United States District Judge for the Eastern District of Michigan, this 21st day of January in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the United States of America the one hundred and fortieth.

(Seal of Court) Elmer W. Voorheis,
Clerk of United States District Court.

Note: An Injunction, of which the foregoing is a copy, was issued at the instance of each of the plaintiffs and intervenors, and service thereof accepted by the defendants.

RETURN ON SERVICE OF WRIT.
(Filed Jan'y 31, 1916.)

United States of America,
Eastern District of Michigan, ss:

I hereby certify and return that I served the within Injunction on the therein-named Frank W. Merrick, John W. Haarer and Grant Fellows by handing to and leaving a true and correct copy thereof with each of them

personally at Lansing in said District on the 28th day of January, A. D. 1916.

Henry Behrendt,
U. S. Marshal.

ORDER OF CONSOLIDATION NUNC PRO TUNC.
(Entered Jan'y 22, 1916, by Judge Arthur J. Tuttle.)

In this case it appearing that the questions and issues of law involved in the above entitled causes are substantially identical, and that said causes may properly be consolidated and treated as one case in so far as proceedings therein taken are concerned, and

Whereas, counsel for respective parties have stipulated and agreed before the court that an Order of Consolidation here may be nunc pro tunc, and

Whereas, said causes were heard together by mutual consent; therefore,

It Is Ordered that said above entitled causes may be, and the same are, hereby consolidated and that the same be regarded as one cause, and

It is further ordered that such consolidation be regarded as in force and effect from and after said hearing.

Arthur J. Tuttle,
Judge of the District Court of the Eastern District of Michigan, Southern Diivsion.

O. K. H. H. S.

Dated this 22nd day of January, A. D. 1916.

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NOTICE OF APPEAL.

(Filed Jan'y 22, 1916.)

The plaintiffs and their solicitors will please take notice that the accompanying petition for order granting an appeal to the United States Supreme Court, and the accompanying assignment of errors will be presented to the Hon. Arthur J. Tuttle, Judge of said court at the office of the clerk of said court in the City of Detroit on Saturday, January Twenty-second, 1916, at nine o'clock A. M., Central Standard Time, or as soon thereafter as counsel may be heard.

Grant Fellows,
Attorney General.

Dated at Lansing this 19th day of January, A. D. 1916.

Business Address: Capitol, Lansing, Mich.

Service of within accepted Jan. 22, 1916.

Beaumont, Smith & Harris,
For Plaintiffs.

PETITION FOR ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

(Filed Jan'y 22, 1916.)

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Your petitioners, Frank W. Merrick, John W. Haarer and Grant Fellows, defendants and appellants in the above entitled cause, considering themselves aggrieved by the orders of this court rendered in said causes on the 30th day of December, A. D. 1915, whereby it was directed that preliminary injunctions might

issue from and under the seal of this Honorable Court prohibiting and restraining the said defendants, as members of the Securities Commission of the State of Michigan from enforcing or attempting to enforce as against, and as applied to, the complainants and intervenors in said causes, the provisions of Act 46 of the Public Acts of the State of Michigan for the year 1915, and whereby said act was declared to be null and void, hereby petition to be allowed to appeal from said order to the Supreme Court of the United States in accordance with the provisions of section 266 of the Judicial Code, as amended, for the reasons specifically set forth in the assignment of errors herewith presented, and filed.

Wherefore your petitioners pray for an order allowing said appeal and also that a transcript of the record and proceedings upon which said orders were made, duly authenticated, may be sent to the Supreme Court of the United States as prescribed by law.

Grant Fellows,
Attorney General.
Solicitor for Defendants and Appellants.

Dated at Lansing, Michigan, this 21st day of January, A. D. 1916.

Service accepted Jany. 22, 1916.

Beaumont, Smith & Harris,
For Plaintiffs.

ASSIGNMENT OF ERRORS.
(Filed Jan'y 22, 1916.)

Now comes the above named defendants and appellants by Grant Fellows, Attorney General of the State of Michigan, their solicitor and say that in the orders rendered by this court in said causes on the 30th day of December, A. D. 1915, whereby a preliminary injunction

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was authorized to be issued against these defendants and appellants restraining them as members of the Michigan Securities Commission of the State of Michigan from enforcing in any way, or attempting to enforce, as applied to said plaintiffs and intervenors, provisions of Act 46 of the Public Acts of the State of Michigan for the year 1915, and whereby said act was held to be null and void, there is manifest error for the following reasons:

I.

The court erred in holding and deciding that it had jurisdiction in said cause.

II.

The court erred in adjudging and decreeing that Act 46 of the Public Act of the State of Michigan for the year 1915 is unconstitutional, null and void.

III.

The court erred in authorizing and directing the issuance of a preliminary injunction restraining these defendants and appellants as composing the Michigan Securities Commission of the State of Michigan from enforcing, and attempting to enforce, as applied to said plaintiffs and the intervenors in said causes, the provisions of said Act No. 46 of the Public Acts of the State of Michigan for the year 1915.

IV.

The court erred in holding, adjudging and decreeing that said Act 46 of the Public Acts for the State of Michigan for the year 1915 is not a proper exercise of the police power of the State and that said act is in any way repugnant to the Constitution of the United States.

V.

The court erred in holding, adjudging and decreeing that said Act 46 of the Public Acts of the State of Michigan for the year 1915 is in violation of section 8 of Article I of the Constitution of the United States.

VI.

The court erred in holding, adjudging and decreeing that said Act 46 of the Public Acts of the State of

Michigan for the year 1915 is in violation of the power of the Congress of the United States to regulate inter-state commerce and that said act constitutes an interference with inter-state commerce in any form.

VII.

The court erred in holding and adjudging that said plaintiffs, or said intervenors, show such cause of act or threatened injury in said bills of complaint, or intervening petitions, as justify the exercise of the jurisdiction of said court or the seeking of any equitable relief therein.

VIII.

The court erred in holding and adjudging that said proceedings are not suits against the State of Michigan.

Wherefore these defendants and appellants pray that said orders of the District Court of the United States for the Eastern District of Michigan, Southern Division, may be reversed and set aside and that said bills of complaint and petitions of said intervenors may be dismissed.

Grant Fellows,
Attorney General,
Solicitor for Defendants and Plaintiffs.

Service of Copy of above accepted this 5th day of Feb'y, 1916.

Beaumont, Smith & Harris.

Dated at Lansing, Michigan, this 21st day of January, A. D. 1916.

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ORDER ALLOWING APPEAL.

(Entered Jan'y 22nd, 1916, by Judge Tuttle.)

The above named defendants, Frank W. Merrick, John W. Haarer and Grant Fellows, composing the Michigan Securities Commission of the State of Michigan having prayed an appeal from the orders made in said causes on the 30th day of December, A. D. 1915, whereby the issuance of preliminary injunctions out of and under the seal of this court, restraining said defendants from in any way enforcing or attempting to enforce the provisions, or any of them as applied to said complainants and the intervenors in said causes, of Act No. 46 of the Public Acts of the State of Michigan for the year 1915, and whereby said act was held, adjudged and decreed to be invalid, null and void, and said complainant having presented to this court and having filed its petition for an order allowing an appeal to the Supreme Court of the United States together with its assignment of errors;

It Is Now Ordered, Adjudged And Decreed By This Court that said appeal be allowed and that a transcript of the record and proceedings in said causes upon which said orders of December 30th, 1915, were made shall be forwarded to the Supreme Court of the United States as prescribed by law and by the rules of court in such case made and provided;

It is further ordered by the court that a citation be issued from this court directed to said complainants and intervenors directing and admonishing them to be and appear in the Supreme Court of the United States within thirty days from this date.

It is further ordered that said defendants and appellants file in this court a bond in the penal sum of Five hundred (500) Dollars conditioned upon the faithful prosecution of their appeal in said causes, and the rendering thereof good, said bond to be executed, approved by this court and filed herein within ten days from the date of this order.

Arthur J. Tuttle,
District Judge.

Dated this 22nd day of January, A. D. 1916.
O. K. H. H. S.

BOND ON APPEAL.

(Filed Jan'y 22, 1916.)

Know All Men By These Presents, That we, Frank W. Merrick, John W. Haarer and Grant Fellows, defendants and appellants in said above entitled causes are held and firmly bound unto said plaintiffs and appellees, N. W. Halsey & Company, Continental and Commercial Trust and Savings Bank, Arthur B. Leach, Ferry W. Leach, George G. Olmsted, Henry L. Higginson, James J. Storrow, George C. Lee, N. Penrose Hallowell, Hugh G. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Frederick W. Allen, David Shaw and A. James Sheldon, and The Weis Fibre Container Corporation, a South Dakota corporation, and the intervening plaintiffs in said causes, in the sum of Five Hundred (500) Dollars to be paid to the said appellees, or to their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of January in the year of our Lord One Thousand Nine Hundred Sixteen.

Whereas said appellants and defendants in the above entitled causes have prosecuted an appeal to the Supreme Court of the United States in accordance with the statute and the rules of court in such case made and provided, to reverse and set aside certain orders rendered and entered in said causes and in said court on the 30th day of December, A. D. 1915;

Now, therefore, the condition of this obligation is such that if said appellants shall prosecute said appeal to effect and shall answer all costs if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

F. W. Merrick,
John W. Haarer,
Grant Fellows.

O. K. H. H. S.
Approved Jan. 22, 1916.

Arthur J. Tuttle,
District Judge.

AGE CUT OFF

CITATION.

(Filed Jan'y 22, 1916.)

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SIXTH CIRCUIT.

United States of America,
Sixth Judicial Circuit, ss.

To N. W. Halsey & Company, Continental and Commercial Trust and Savings Bank, Arthur B. Leach, Ferry W. Leach, and George G. Olmstead, Henry L. Higginson, James S. Storrow, George C. Lee, N. Penrose Hallowell, Hugh C. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Frederick W. Allen, David Shaw and A. James Sheldon, and the Weis Fibre Container Corporation, a South Dakota Corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C., on the* 21st day of February next, pursuant to an Appeal filed in the Clerk's Office of the District Court of the United States for the Eastern District of Michigan, wherein Frank W. Merrick, John W. Haarer and Grant Fellows, are Appellants, and you are Appellees to show cause, if any there be, why the Decree rendered against the said Appellants in said Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 22nd day of January in the year of our Lord one thousand nine hundred and Sixteen, and of the Independence of the United States of America the one hundred and fortieth.

Arthur J. Tuttle.
United States District Judge, Eastern District of Michigan.

*Not exceeding 30 days from the day of signing.

Due and timely service of the within Citation is hereby accepted this 5th day of February, 1916.

Beaumont, Smith & Harris,
Solicitors for Complainants-Appellees.

PRAECIPE FOR APPEAL RECORD.

(Filed Feb. 5, 1916.)

To the Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division:

For the purposes of appeal of said above entitled causes to the Supreme Court of the United States, you are hereby requested to prepare certified transcripts of the following pleadings, papers and other matters for the record in said causes in accordance with the statutes and rules of court pertaining thereto:

(1) The bill of complaint in N. W. Halsey & Company, et al., plaintiffs, vs. Frank W. Merrick, et al., defendants.

(2) The bill of complaint in The Weis Fibre Container Corporation, a South Dakota Corporation, plaintiff, vs. Frank W. Merrick, defendants.

(3) The subpoenas duly issued and served in said causes.

(4) The order to show cause issued by said court in said causes.

(5) The appearance of the Attorney General in each of said cases.

(6) The affidavit of defendants Frank W. Merrick, John W. Haarer and Grant Fellows duly filed in said causes.

(7) Defendant's motion to dismiss the bills of complaint.

(8) Rules 22 and 23, Michigan Securities Commission.

(9) The intervening petition of Otis and Company.

(10) The stipulation of counsel for respective parties with reference to the intervening petitions, the questions presented thereby and designating the intervenors.

(11) The temporary restraining orders issued in said causes on the 3rd day of September, 1915.

(12) The orders of the court, made pursuant to stipulation, extending the restraining orders in said cases until the 25th day of October, 1915.

(13) The journal entry in the case of N. W. Halsey & Company, et al., plaintiffs, vs. Frank W. Merrick, et al., defendants, stating that the restraining order be continued in force until the motion for temporary injunction should be disposed of.

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(14) The orders of the court made on the 30th day of December, 1915, in each of said cases allowing the issuance of preliminary injunctions.

(15) The opinion of the court on the application for preliminary injunction filed December 30, 1915.

(16) The form of bond presented by appellees pursuant to the orders granting the preliminary injunction, and the approval of the court thereof.

(17) Copy of one of the preliminary injunctions issued in said causes.

(18) The order of consolidation of said causes made January 22nd, 1916.

(19) Notice of presentation of petition and assignment of errors.

(20) Petition for order allowing appeal.

(21) The assignment of errors.

(22) The order allowing appeal, made on January 22nd, 1916.

(23) Appellants' appeal bond.

(24) The citation directed to appellees requiring their appearance in the Supreme Court.

(25) The praecipe to the clerk of the District Court for the Eastern District of Michigan, Southern Division.

Grant Fellows,
Attorney General,
Solicitor for Defendants and Appellants.

Dated this 5th day of February, A. D. 1916.

Service of copy of above accepted this 5th day of Feby., 1916.

Beaumont, Smith & Harris.

STIPULATION WITH REFERENCE TO INTERVENING PETITIONS, THE QUESTIONS PRESENTED THEREBY AND DESIGNATING THE INTERVENORS.

(Filed Feby. 5, 1916.)

It is hereby stipulated and agreed by and between the parties to the above entitled causes through their respective counsel that the rights of the intervenors therein shall be regarded for the purposes of the appeal to the Supreme Court of the United States as the same as and as subject to the same incidents and conditions as the rights of the original complainants in said causes. It is further stipulated and agreed that none of the intervening petitions present questions other or different than the questions involved in the original bills of complaint. For the purposes of said appeal the following shall be regarded as intervening petitioners in said causes: Powell Gerard & Company, a Maine corporation; Wilsey Fierlein & Company, an Illinois co-partnership; Bolger Mosser & Willaman, an Illinois corporation; Otis & Company, an Ohio co-partnership; William P. Bonbright & Company, a New York corporation; Peabody Houghteling & Company, an Illinois co-partnership; Remick Hodges & March, a New York co-partnership; Yard, Otis & Taylor, an Illinois corporation; Charles S. Kidder & Company, a resident of Illinois; F. A. Brewer & Company, an Illinois partnership; Howard Simmons & Company, an Illinois corporation; William A. Read & Company, a New York co-partnership; Tillottson & Wolcott, an Ohio corporation; E. H. Rollins & Sons, a Maine corporation; John Nuveen & Company, a resident of Illinois; McCoy & Company, a Maine corporation; Devitt Trimble & Company, an Illinois co-partnership; William R. Compton Bond and Mortgage Company, a Missouri corporation; Chicago Savings Bank & Trust Company, an Illinois corporation; W. G. Souders & Company, a Maine corporation; and The Superior Life Insurance Company an Illinois corporation.

Beaumont, Smith & Harris,
Solicitors for Plaintiffs.
Grant Fellows
Attorney General Solicitor for Defendants.

Dated this 5th day of Feby. A. D. 1916.

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ORDER EXTENDING TIME TO FILE AND DOCKET PRINTED RECORD ON APPEAL TO AND INCLUDING THE 15th DAY OF MARCH, 1916.

(Entered Feb'y 17, 1916, by Judge Tuttle).

Upon the application of the clerk of this court for cause shown, it is by the court now here ordered that the time in which to file and docket printed record on appeal be and the same is hereby extended to and including the 15th day of March, 1916.

Arthur J. Tuttle,
United States District Judge.

Supplemental Transcript of Record

Supreme Court of the United States

October Term, [redacted] 1916

No. [redacted] 413

FRANK W. MERRICK, JOHN W. HAAHER AND GRANT FELLOWS,

Appellants,

vs.

N. W. HALSEY & COMPANY ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION,

Appellees.

Appeal From the District Court of the United States For the Eastern District of Michigan.

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In the District Court of the United States

EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 131. In Equity.

N. W. Halsey & Company; Continental & Commercial Trust & Savings Bank; Arthur B. Leach, Ferry W. L. Leach, and George G. Olmstead; Henry L. Higginson, James J. Storrow, George C. Lee, N. Penrose Hallowell, Hugh G. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Frederick W. Allen, David Shaw and A. James Sheldon,

Plaintiffs,

William H. Remick, George W. Hodges and Herbert B. March,

Intervening Plaintiffs,

vs.

Frank W. Merrick, John W. Haarer and Grant Fellows,

Defendants.

STIPULATION FOR SUPPLEMENTAL PRINTED RECORD ON APPEAL.

(Filed Apr. 6, 1916.)

In the above entitled cause it is hereby stipulated and agreed by and between the solicitors for the appellants and for the appellees, that this stipulation, petition and the amended petition for intervention in this cause of William H. Remick, George W. Hodges and Herbert B. March, doing business as Remick, Hodges & Co., filed in this cause October 19, 1915, be printed as part of the record of this cause on appeal, the said petition having been omitted by inadvertance from the said record as originally printed. It is also stipulated that

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the stipulation in this cause heretofore entered into under date of February 5, 1916, and printed on page 117 of the record on appeal in this cause is amended to strike out the words "Remick, Hodges & March, a New York corporation," and is set aside in so far as it refers to the said intervening petition of William H. Remick, George W. Hodges and Herbert B. March, therein referred to as Remick, Hodges & March. It is further stipulated that the record on appeal shall show that said petition of William H. Remick, George W. Hodges and Herbert B. March was allowed on the 4th day of November, 1915.

Grant Fellows,
Attorney General,
Attorney for Defendants.
Beaumont, Smith & Harris,
Attorneys for Plaintiffs.
R. R. Reed,
Atty. for Intervenor and Appellee.

Dated April 3, 1916.

PETITION OF WM. H. REMICK, GEO. W. HODGES, AND HERBERT B. MARCH FOR INTERVENTION.

(Filed Oct. 19, 1915.)

To the Honorable, the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division:

William H. Remick, George W. Hodges and Herbert B. March bring this their petition against Frank W. Merrick, John W. Haarer and Grant Fellows; and said petitioners complain and allege as follows:

I. That your petitoner William H. Remick is a resident of the City of New York, New York, your petitioner George W. Hodges is a resident of the Village of Bay Shore, New York, and your petitioner Herbert B.

March is a resident of the City of Orange, New Jersey; and that your petitioners are co-partners doing business under the firm name of Remick, Hodges & Company, having their principal place of business in the City of New York, N. Y.

II. That your petitioners are engaged in the business of dealing in, buying, selling, offering and negotiating stocks, bonds and other securities, issued by corporations and associations. That such business is known as investment banking, and is carried on by your petitioners in the City and State of New York, at their offices in said city, and also by agents in said city and elsewhere, and by mail, with various corporations, associations and persons throughout the United States and in the State of Michigan. That it is the custom in said business and of your petitioners to make offerings of securities held for sale and owned by your petitioners to various corporations, associations and persons, including the customers of your petitioners which offerings are made by agents and by mail throughout the United States and in the State of Michigan. That your petitioners now own many of such securities which they have offered, are offering and desire to continue to offer to their customers and to other corporations, associations and persons in the State of Michigan.

III. That your petitioners have no place of business in said state and at the present time are not sending any agents into said state, but they are endeavoring to secure business in said state and to sell securities therein as stated. The volume of such business and the value thereof is not sufficient to enable or justify your petitioners to attempt to comply with Act 46 of the Public Acts of 1915, referred to in said complaint, and that said act if enforced against your petitioners would have the effect of preventing them from making any further offerings in said state and from attempting to establish or develop any business therein, and from selling securities therein.

IV. That said act from its very nature excludes your petitioners from enjoying that freedom of commerce between the states which your petitioners have heretofore enjoyed and upon which the developments and growth of your petitioners' business of buying and selling such securities necessarily depends. That said act if enforced would irreparably injure and destroy such business and would prevent its extension into the State of Michigan, and your petitioners claim the right to ex-

tend such business throughout the United States and into such State of Michigan and to make offerings of securities therein by mail or by agents without paying the fees required by such act or submitting to its other burdensome and prohibitive requirements, and also without obtaining the permission of the defendants herein for the prosecution of such business or the making of such offerings under the terms of said act.

V. That your intervening petitioner is interested in the subject matter of the suit herein in like manner and to like extent as the complainants herein.

VI. That your intervening petitioner adopts the allegations of the bill of complaint as full and completely as though said allegations were set out in full herein, insofar as the same is applicable to it as a copartnership not having an established place of business in said state nor any agents doing business therein, and your intervening petitioner asks that it may be permitted to come into this cause as a party complainant.

VII. Your intervening petitioners charge that Act 46, Public Acts of 1915, is unconstitutional and void and of no effect, for the reasons and upon the grounds set forth in said complaint, and for the further reason that it entirely prevents your intervening petitioners from continuing to offer securities in said state and thereby deprives your petitioners of their liberty and property without due process of law, and destroys the freedom of commerce between the states.

Wherefore your intervening petitioners pray that they may be permitted to come in as parties complainant herein, and prays as in said bill of complaint, and that they may have such other and additional and further relief as to the court may seem equitable in the premises.

William H. Remick,
George W. Hodges,
Herbert B. March,
Intervenors,
By Hal H. Smith,
One of their Solicitors.

Robert R. Reed,
Solicitor for Intervenors,
Address, 111 Broadway,
New York City,
New York.
Beaumont, Smith and Harris,
Solicitors for Intervenors,
Ford Bldg., Detroit.

AMENDMENT TO PETITION OF WILLIAM H. REMICK, GEORGE W. HODGES AND HERBERT B. MARCH.

(Filed Nov. 16, 1915.)

The petition of the aforesaid petitioners, William H. Remick, George W. Hodges and Herbert B. March, is amended by the addition thereto of a new paragraph to be known as paragraph V (a), to read as follows:

That your petitioners' business endangered by this Act is the selling of securities owned by it, and that it desires to carry on such business, and not the brokerage business or the business of selling for others, in the State of Michigan. That the penalties imposed by said Act apply to each and every offering of any security in said State, and that said penalties are so severe and cumulative, both as applied to your petitioners and to any agent that they may wish to employ to sell in said State, that the mere enforcement of said Act as now threatened and carried on by the defendants so burdens and endangers any possible attempt by your petitioners to conduct their business by making offerings of securities in the State, and so endangers the liberty and property of any agent whom they may wish to send into the State, that they will be unable to make such offering or to obtain such offerings unless given relief by this court. That your petitioners will be constrained to submit to said invalid Act rather than take the chances of the penalties imposed by said Act.

Beaumont, Smith & Harris,
Solicitors for Plaintiffs.

ORDER ALLOWING REMICK, HODGES & MARCH, ET AL., TO INTERVENE.

(Entered Nov. 4th, 1915, by Judge Tuttle.)

The petitions of Tollitson and Wolcott Company; William A. Read, John W. Horner, Jr., T. H. Seaman, R. W. Martin, James Dean, R. L. Taylor, W. M. L. Fiske and Nigel L. Campbell, co-partners, as Wm. A. Read & Company, William H. Remick, George W. Hodges and Herbert B. March; Chicago Savings Bank and Trust Company; Yard, Otis and Taylor; Chas. S. Kidder, as Chas. S. Kidder & Co.; Frederick A. Brewer, Everett C. Brewer and Martin Kehoe, co-partners as F. A. Brewer & Co.; Howard, Simmons & Co.; W. G. Souders & Co.: and William R. Compton Bond and Mortgage Company, praying for intervention in the above entitled cause, having this day come on to be heard;

It is Hereby Ordered that the above named Tillotson and Wolcott Company; William A. Read, John W. Horner, Jr., T. H. Seaman, R. W. Martin, James Dean, R. L. Taylor, W. M. L. Fiske and Nigel L. Campbell, co-partners as Wm. A. Read & Company; William H. Remick, George W. Hodges and Herbert B. March; Chicago Savings Bank & Trust Company; Yard, Otis and Taylor; Chas. S. Kidder, as Chas. S. Kidder & Co.: Frederick A. Brewer, Everett C. Brewer and Martin Kehoe, co-partners as F. A. Brewer & Co.; Howard, Simmons & Co.; W. G. Souders & Co.; and William R. Compton Bond and Mortgage Company, have leave to intervene as plaintiffs in said cause.

Arthur J. Tuttle,
District Judge.

MAY 6 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 413

FRANK W. MERRICK,
JOHN W. HAARER,
GRANT FELLOWS,
Appellants in Error,
vs.
N. W. HALSEY, ET AL.,
Defendants in Error.

MOTION TO ADVANCE

GRANT FELLOWS,
Attorney General,
Solicitor for Appellants in Error,
Business Address: Capitol, Lansing,
Michigan.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 900

FRANK W. MERRICK,
JOHN W. HAARER,
GRANT FELLOWS,
Appellants in Error,
vs.
N. W. HALSEY, ET AL.,
Defendants in Error.

MOTION TO ADVANCE.

Now comes Grant Fellows, Attorney General of the State of Michigan, as Solicitor for Plaintiffs in Error, and moves the Court now here to advance the above entitled cause for hearing at a date such as may be fixed by this Honorable Court. This Motion is based upon the records and files in said cause and upon the affidavit of Grant Fellows.

Dated at Lansing, Michigan, April 25th, 1916.

GRANT FELLOWS,
Attorney General,
Solicitor for Appellants in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

NO. 900.

FRANK W. MERRICK, JOHN W. HAARER, GRANT FELLOWS, *Appellants in Error,* vs. N. W. HALSEY, ET AL., *Defendants in Error.*	Affidavit.

State of Michigan
County of Ingham } ss.

Grant Fellows being duly sworn deposes and says that he is Attorney General of the State of Michigan and is the Solicitor for said Appellants in Error; that the above entitled cause is an appeal from an Order of the District Court of the United States for the Eastern District of Michigan, Southern Division, allowing an interrogatory injunction against the Appellants in Error to restrain the enforcement of Act No. 95 of the Public Acts of Michigan, Session of 1915, said Act being entitled:

> "An Act to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State of Michigan by any dealer, firm, company, association or corporation, foreign or domestic, by requiring an inspection of such stocks,

bonds, or other securities and an inspection of the business of such persons, firms, companies, associations or corporations, including dealers and agents, and such regulation and supervision of the business of said persons, firms, companies, associations, or corporations, including dealers and agents, as may be necessary to prevent fraud in the sale within the State, of any stocks, bonds or other securities, and to provide a penalty for the violation thereof, and to repeal Act number one hundred forty-three of the Public Acts of nineteen hundred thirteen, approved May two, nineteen hundred thirteen, and all other Acts or parts of Acts inconsistent herewith."

The said Appellants being respectively the Banking Commissioner of the State of Michigan, the State Treasurer of the State of Michigan and the Attorney General of the State of Michigan and constituting the Michigan Securities Commission created by the terms of said Act number 46.

Deponent further says that said Act number 46 of the Public Acts of 1915 is similar in purport to Acts passed in twenty-two of the States of the Union, and that therefore the above entitled cause is a cause of general interest not only in the State of Michigan but elsewhere.

GRANT FELLOWS,
Attorney General.

Subscribed and sworn to before me,
this 25th day of April, A. D., 1916.

ALBERT H. GRAHAM,
Notary Public,
Ingham County, State of Michigan.
My Commission expires April 19, 1919.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

NO. 900.

FRANK W. MERRICK, JOHN W. HAARER, GRANT FELLOWS, *Appellants in Error,* vs. N. W. HALSEY, ET AL., *Defendants in Error.*	Notice.

To Beaumont, Smith & Harris,
Solicitors for Weis Fibre Container Corporation,
Business Address: Ford Bldg., Detroit, Michigan.

To Reed & McCook,
Solicitors for N. W. Halsey & Company; Continental & Commercial Trust & Savings Bank; Arthur B. Leach, Ferry W. Leach, and George G. Olmstead; Henry L. Higginson; James J. Storrow, George C. Lee, N. Penrose, Hallowell, Hugh G. Levick, Charles H. Schweppe, Francis L. Higginson, Jr., Frederick W. Allen, David Shaw and A. James Sheldon, and Powell Gerard & Company; Wilsey Fierlein & Company; Peabody Houghteling & Company; Yard, Otis & Taylor; Charles S. Kidder & Company; A. Brewer & Company; Howard Simmons & Company; William A. Reed & Company; Tillottson & Wolcott, E. H. Rollins & Sons; John Nuveen & Company; McCoy & Company; Devitt, Tremble & Company; William R. Compton Bond &

Mortgage Company; Chicago Savings Bank & Trust Company; and W. G. Souders & Company.

Business Address: 15 William Street, New York City.

You will please take notice that we have filed a Motion to advance in the above entitled cause, which Motion to advance is based upon the Affidavit of Grant Fellows, a copy of which you are herewith served.

You will further take notice that said Motion will be brought on for hearing at the Supreme Court room in the Capitol in the City of Washington on Monday, the 8th day of May, A. D., 1916.

Dated April 25th, 1916.

GRANT FELLOWS,
Attorney General,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915,

NO. 900.

FRANK W. MERRICK, JOHN W. HAARER, GRANT FELLOWS, *Appellants in Error*, vs. N. W. HALSEY, ET AL., *Defendants in Error*.	Proof of Service.

State of Michigan
County of Ingham } ss.

Horace E. Craig being duly sworn deposes and says that on the 25th day of April, A. D., 1916, he served upon Beaumont, Smith & Harris, Solicitors for Weis Fibre Container Corporation, and upon Reed & McCook, Solicitors for N. W. Halsey & Company, et al. Notice of Motion to advance, a copy of which is attached hereto, by enclosing the same in an envelope addressed to "Hal. H. Smith, Ford Bldg., Detroit, Michigan"; and "Reed & McCook, 15 William Street, New York City", and by depositing the same in the Post Office at City of Lansing, Michigan, postage thereon being fully prepaid.

HORACE E. CRAIG.

Subscribed and sworn to before me, this 25th day of April, A. D., 1916.

ALBERT H. GRAHAM,
Notary Public,
Ingham County, State of Michigan. My Commission expires April 19, 1919.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

NO. 900.

FRANK W. MERRICK,
JOHN W. HAARER,
GRANT FELLOWS,
Appellants in Error,
vs.
N. W. HALSEY, ET AL.,
Defendants in Error.

STATEMENT.

This case is an appeal under Section 266 of the Judicial Code from an Order of the District Court of the United States for the Eastern District of Michigan, Southern Division, (three Judges sitting) allowing an interrogatory injunction against the appellants who are respectively the Banking Commissioner, the State Treasurer and the Attorney General constituting the Michigan Securities Commission created by Act number 46 of the Public Acts of 1915, which Act is "An Act to prevent fraud in the sale of stocks, bonds or other securities sold or offered for sale within the State of Michigan, etc."

Twenty-two States of the Union have passed Acts of similar purport, some of them being substantially identical with the Michigan statute under consideration in the instant case

the only change being such as may be necessary in the creation of the Board or to meet local conditions. The case, therefore is of public interest as distinguished from local or State interests and we submit belongs to that character of cases which is entitled to advancement under the rules of this Court.

Respectfully submitted,

GRANT FELLOWS,

Attorney General,

Solicitor for Appellants.

SEP 23 1
JAMES D. MA

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 413.

FRANK W. MERRICK, JOHN W. HAARER AND GRANT FELLOWS,
Appellants,
vs.
N. W. HALSEY & COMPANY, ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION,
Appellees.

BRIEF FOR APPELLANTS.

GRANT FELLOWS,
Attorney General.
Attorney for Appellants.
Business Address:
Capitol, Lansing, Mich.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 413

FRANK W. MERRICK, JOHN W. HAARER AND GRANT FELLOWS,

Appellants,

vs.

N. W. HALSEY & COMPANY, ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT.

The appellees assailed the validity of Act number 46 of the Public Acts of 1915, entitled:

AN ACT to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State of Michigan by any dealer, firm, company, association

or corporation, foreign or domestic, by requiring an inspection of such stocks, bonds, or other securities and an inspection of the business of such persons, firms, companies, associations or corporations, including dealers and agents, and such regulation and supervision of the business of said persons, firms, companies, associations, or corporations, including dealers and agents, as may be necessary to prevent fraud in the sale within the State, of any stocks, bonds or other securities, and to provide a penalty for the violation thereof, and to repeal act number one hundred forty-three of the Public Acts of nineteen hundred thirteen, approved May two, nineteen hundred thirteen, and all other acts or parts of acts inconsistent herewith.

For convenience we here reprint the Act in full:

[Act No. 46, P. A. 1915.]

The People of the State of Michigan enact:

SECTION 1. There is hereby created a commission to be known as the Michigan Securities Commission and hereafter called in this act "the commission," whose duty it shall be to administer and provide for the enforcement of all the provisions of this act. Said commission shall consist of the Commissioner of the State Banking Department who shall be president thereof; the State Treasurer of the State and the Attorney General of the State, all of whom shall be members of said commission during their respective terms of office and any two of whom shall constitute a quorum. The said commission shall succeed the Michigan securities commission created by act one hundred forty-three of the Public Acts of nineteen hundred thirteen, and as such successors shall receive all of the files, papers and property of said Michigan securities commission created by said act one hundred forty-three of the Public Acts of nineteen hundred thirteen. All

proceedings pending before said Michigan securities commission created by said act one hundred forty-three of the Public Acts of nineteen hundred thirteen shall be continued by the commission created by this act; all actions, civil and criminal, pending under said act one hundred forty-three of the Public Acts of nineteen hundred thirteen shall be continued and completed thereunder. Said commission shall have its office in the capitol in the city of Lansing, in rooms to be provided by the Board of State Auditors, and all of its records shall be there kept. It shall hold a regular meeting on the first Friday of each month and may hold special meetings upon the call of the president. It shall keep a complete record of all its meetings, its accounts and the business it transacts. It shall appoint a secretary whose salary shall not exceed the sum of twenty-five hundred dollars per annum and shall have power to employ such other and further assistance as may be necessary to carry out the provisions of this act. All salaries fixed by it shall be subject to the approval of the Board of State Auditors. It shall make such rules and regulations as may be necessary to carry out the provisions of this act and may prepare all necessary blanks to be used in its proceedings and in the conduct of its business.

Sec. 2. Every person, corporation, co-partnership, company, or association (except those exempt under the provisions of this act) organized, or which shall hereafter be organized in this State, whether incorporated or unincorporated, which shall either himself, themselves or itself, or by or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, them or it within the State of Michigan, shall be known for the purpose of this act as a domestic investment company. Every such person, corporation, co-partnership or association resident of or organized in any other state, territory or government, shall be known for the purposes of this act as a foreign investment company.

Sec. 3. The provisions of this act shall not apply to (a)

securities of the United States, or any foreign government, or of any state or territory thereof, or of any county, city, township, district or other public taxing subdivision of any state or territory of the United States, or of any foreign government; (b) unsecured commercial paper; (c) securities of public or quasi public corporations, the issue of which securities are regulated by the Michigan Railroad Commission or by a public service commission o rboard of equal authority of any state or territory of the United States or securities senior thereto; (d) securities of state or national banks or trust companies, or building and loan associations of this State (e) securities of any domestic corporation organized without capital stock and not for pecuniary gain, or exclusively for educational, benevolent, charitable or reformatory purposes; (f) mortgages upon real and personal property situated within this State where the entire mortgage is sold and transferred with the note or notes secured by such mortgages; (g) increase of stock sold and issued to stockholders, also stock dividends; (h) securities which are listed in any standard manual of information approved by said commission: *Provided, however*, That said commission shall have the power to call for additional and further information than that contained in such manuals with reference to any securities listed therein, and may, pending the filing of such information, suspend the sale of such securities, and also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice to the issuer of such securities if said commission shall find that the sale of such securities would work a fraud upon the purchasers thereof; (i) all stocks, bonds and securities approved by the Michigan securities commission created by act one hundred forty-three of the Public Acts of nineteen hundred thirteen.

SEC. 4. Before selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever in this State, any stocks, bonds or other securities of its own

issue, every investment company, domestic or foreign, shall file in the office of the commission a statement showing in full detail the plan upon which it proposes to transact business; a copy of all contracts, stocks, bonds or other instruments which it proposes to make with, or sell to, its contributors or customers, together with a copy of its prospectus, and of the proposed advertisements of its scale of stocks, bonds, or other securities which statement shall also show the name and location and main office of the investment company; the names and addresses of its officers, and an itemized account of its financial condition and the amount of its assets and liabilities, and such other information touching its conditions and affairs as the commission may require. If such investment company shall be a co-partnership or an unincorporated association it shall also file with the commission a copy of its articles of co-partnership or association, and all other papers pertaining to its organization. If it be a corporation organized under the laws of Michigan it shall also file with the commission a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the commission a copy of the laws of the state, territory or government under which it exists or is incorporated, and also a copy of its charter and the certificate of the proper officer of such state showing that it is authorized to transact business there; and also copies of its constitution and by-laws, and all amendments of any of the above mentioned instruments which have been made, and all other papers pertaining to its organization. It shall also pay a filing fee of one-tenth of one per cent upon the face value of the securitites for the sale of which application is made: *Provided, however,* That such filing fee shall not be more than one hundred dollars, nor less than ten dollars.

SEC. 5. All of the above described papers shall be verified by the oath of a member of the co-partnership or company, if it be a co-partnership or company, and by the oath of a duly authorized officer, if it be a corporation or an unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified by the officer of whose records or archives they form a part, as being correct copies of such records or archives.

SEC. 6. Every foreign investment company before offering for sale any of its stocks, bonds or other securities in this State shall also file its irrevocable written consent that suits and actions may be commenced against it in the proper court of any county in this State in which a cause of action may arise or in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of this State, on the Commissioner of the State Banking Department, said consent stipulating and agreeing that such service of such process or pleadings on such commissioner shall be taken and held in all courts to be as valid and binding as if due service had been made upon the company itself, and said instrument containing such consent shall be authenticated by the seal of said foreign investment company, and by the acknowledged signature of a member of the co-partnership or company, if it be a co-partnership or company, or by the acknowledged signature of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees or managers of the corporation or association, authorizing the secretary and president to execute the same. In case any process or pleadings mentioned in this act are served upon the Commissioner of the State Banking Department, it shall be by duplicate copies, one of which shall be filed in the office of the Michigan Securities Commission and another immediately forwarded by registered mail to the head

office of the person or corporation against which said process or pleadings are directed.

SEC. 7. Said application shall be heard by the said commission at the next regular meeting after said application is filed (providing such filing shall precede such monthly meeting by twenty-four hours), or at a special or adjourned meeting of said commission, but if such application is heard at a special or adjourned meeting of said commission the secretary shall give such applicant at least two days notice of such hearing. Said commission may have power to adjourn such hearings upon such applications from day to day or from time to time.

SEC. 8. The said commission shall have power to demand from any investment company seeking to come under the provisions of this act any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, a business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and intangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said commission may prescribe. And said commission may withhold its license to sell such stocks, bonds and securities if such corporation has issued stocks,

bonds and securities in payment for property, patents, good will, promotion and intangible assets in excess of their value as found by said commission or if said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such commission until such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said commission have been surrendered to such corporation and cancelled by it, and until the said stock has been deposited in escrow under the terms prescribed by said commission.

SEC. 9. It shall be the duty of said commission to examine the statements and documents filed in its office by an investment company and the reports of any investigation conducted under the direction of said commission and to hear such applicant and it shall have power to examine under oath any person interested or connected with such investment company, and if said commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser, then said commission shall disapprove the sale of such proposed contracts, stocks, bonds or other securities and shall notify such investment company by registered mail of its findings and disapproval, and it shall be unlawful for such company to do any business in the way of selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever of any such contracts, stocks, bonds and other securities in this State; and said contracts, stocks, bonds and other securities shall not be sold in this State. If, however, said commission shall not find that the proposed plan of business of said investment company or that its proposed contracts, stocks, bonds or other securities are fraudulent or are

of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser thereof, then it shall approve the sale of such stocks in the State of Michigan and issue its certificate in substantially the following language:

"This is to certify that the .....
has this date been given permission to sell $.....
of its ..... within the
stocks, bonds or securities.
State of Michigan. The Commission does not recommend the purchase of this security.
Dated.....
In Witness Whereof, I have hereunto affixed the corporate seal of the Michigan Securities Commission.
(SEAL) .....
Secretary."

The words "The commission does not recommend the purchase of this security" shall be printed in type two sizes larger than any other part of said certificate, and in case said certificate or the fact that said commission has approved said security is printed or published in any circular, pamphlet or newspaper, the words "The commission does not recommend the purchase of this security" shall be printed in type two sizes larger than the type in which the statement of fact that such security has been approved by said commission appears.

SEC. 10. Any person, firm, co-partnership, corporation or association whether domestic or foreign, not the issuer, who shall in this State sell or offer for sale any of the stocks, bonds or other securities issued by any foreign or domestic investment company, except the securities specifically exempted in this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities, shall be deemed to be a "dealer" in

such securities within the meaning of this act, and no dealer within the meaning of this act shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities unless and until he shall have filed a list of the same in the office of the Michigan Securities Commission as in this act provided. The term "dealer" shall not include an owner not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust.

SEC. 11. Any dealer desiring to sell or offer for sale within this State any stocks, bonds or other securities not exempted under the terms of this act, shall first register with the Michigan Securities Commission and shall furnish said commission, upon oath, in such form as the commission shall prescribe, the following information, to-wit: The dealer's name, residence and business address, the general character of the securities to be dealt in, the place or places where the business is to be conducted within this State, and where the business in this State is not to be conducted by the dealer in person, then the names and addresses of all the persons in charge thereof. Said dealer shall pay to the commission a fee of fifty dollars and shall furnish said commission with such other information in addition to that above specified as said commission shall deem necessary in order to thoroughly acquaint such commission with the character of the business of said dealer. All authorized agents of any dealer shall be registered with the commission and the name of any agent shall be stricken from the register by the commission upon the written request of the dealer and additional agents may be registered by the commission upon like request of the dealer: *Provided*, That no agent shall act as such until his name and address shall be registered with the commission. If the dealer shall be a non-resident of this State or a corporation

other than a domestic corporation, he shall at the time he registers with the commission, file with the commission a written duly authenticated appointment of the Commissioner of the State Banking Department of this State as his or its agent in Michigan upon whom process or pleadings may be served for and on behalf of the dealer, which appointment shall be irrevocable. Upon compliance by such dealer with the provisions of this act the said commission shall issue to such dealer a license under the seal of said commission and signed by the secretary thereof, which said license shall be good until revoked by said commission for good cause upon notice to such dealer and a hearing duly had: *Provided further,* That said commission shall issue the license provided for in this section to each dealer registered under act one hundred forty-three of the Public Acts of nineteen hundred thirteen upon the payment to said commission of the sum of one dollar, and shall also issue licenses under the terms of this act and upon the payment of the sum of twenty-five cents to such agents as were registered under the provisions of said act number one hundred forty-three of the Public Acts of nineteen hundred thirteen.

SEC. 12. In addition to the filing and examination fees herein provided for to be paid by investment companies and dealers, there shall be charged and collected by said commission a fee of three dollars for the registration and authorization of each agent of any such investment company or dealer and all the fees and charges collected by the commission shall be turned into the State Treasury and are hereby reappropriated to the commission towards paying the expenses of enforcing this act. The expenses of said commission shall not, however, be limited to the moneys received by it, but it shall have the power to incur all expenses it finds necessary in enforcing the provisions hereof.

SEC. 13. General accounts of every investment company, domestic or foreign, shall be kept in a businesslike, and in-

telligent manner and in sufficient detail that said commission can ascertain at any time its financial condition and the books of accounts shall at all times during business hours, except on Sundays and legal holidays, be open to stockholders and investors in said company, and the said commission, or its duly authorized representatives, and all such investment companies, shall be subject to examination by said commission or any member thereof or the clerks, accountants or examiners thereof, at any time said commission shall deem it advisable, and in the same manner as it is now provided for the examination of State banks, and such investment company shall pay a fee for each of such examination of not to exceed seven dollars fo reach day or fraction thereof that any member of said commission, clerk, accountant or examiner is absent from the capitol building for the purpose of making such examination and shall also pay the actual traveling and hotel expenses of the person or persons making such examination and the failure or refusal of any investment company to pay such fees, upon demand of such commission, clerk, accountant or examiner, while making such examination shall work a forfeiture of the right of such investment company to sell or offer for sale any of its contracts, stocks, bonds or other securities in this State. In case of a preliminary examination of any investment company by said commission for the purpose of the ascertainment by said commission as to whether said company shall be permitted to come under the provisions of this act, the fee for such examination shall be the same as in this section provided, and in case it shall be made to appear to the commission from the examination of said investment company after said investment company has been authorized to sell its stocks, bonds and securities that the further sale of said stocks, bonds and other securities would work a fraud upon the purchaser, then said commission may make an order revoking the license of said investment company to sell its stocks, bonds and securities upon notice duly given and a hearing duly had and may,

pending such hearing, suspend the right of said investment company to sell its stocks, bonds and securities.

SEC. 14. It shall be unlawful for any investment company or dealer, or representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatever in this State, any stocks, bonds or other securities (except as expressly exempted herein), unless and until said commission has approved thereof and issued its certificate in accordance with the provisions of this act, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statements and papers required to be filed by virtue of the provisions of this act or the rules of the commission. It shall be unlawful for any investment company or dealer, or its or his agents, to issue, circulate or deliver any advertisement, pamphlet, circular, prospectus, or other document in regard to its stocks, bonds or other securities in the State of Michigan differing in any way from the copy filed with said commission as provided by this act. It shall be unlawful for any newspaper published in the State of Michigan to advertise the sale of any stocks, bonds or securities which have not been approved by said commission or which are not exempt under the provisions of this act.

SEC. 15. No dealer within the meaning of this act shall sell or offer for sale within this State any of the stocks, bonds or other securities of any investment company unless such investment company shall have fully complied with all the provisions of this act, nor until said dealer shall have registered with the commission, under the terms of this act: *Provided, however*, That should any dealer desire to sell or offer for sale within this State the stocks, bonds or other securities of an investment company, which has not itself complied with the provisions of this act, said dealer shall make application to the said commission for license as hereinbe-

fore provided for applications by investment companies and shall pay the same fee required to be paid by said investment company.

SEC. 16. All information obtained by the commission with reference to any securities and all records of the commission relating thereto shall be open to examination by the public, and it shall be the duty of the commission to preserve such information, and so classify, and arrange it as to facilitate examination. The commission may from time to time issue in pamphlet form, or by means of newspaper advertisements or otherwise, any and all information regarding any and all contracts, stocks, bonds or other securities sold or offered for sale within this State which it deems would be of public interest or advantage. All fees herein provided for shall be paid into the State Treasurer by the commission upon receipt thereof.

SEC. 17. Nothing in this act shall be construed to repeal or modify any laws giving the State Banking Department of this State control of and supervision over State banks and the business of banking in this State, nor shall any part of this act be construed to repeal or modify laws giving the Commissioner of Insurance of this State control of and supervision over the business of insurance in this State, and those engaged therein.

SEC. 18. The commission shall adopt a seal with the words "Michigan Securities Commission" and such design as the commission may prescribe, engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the commission certified by the secretary thereof and authenticated by the seal of said Michigan Securities Commission shall be received in evidence in all courts equally and with like effect as the originals.

SEC. 19. Any person who shall knowingly or wilfully subscribe to or make or cause to be made any false statement or false entry in any book of any investment company, or who shall exhibit any false paper with the intention or for

the purpose of deceiving any person authorized to examine into the affairs of said investment company or shall make or publish any false statement of the financial condition of said investment company or false statement relating to the contracts, stocks, bonds, or other securities by it issued and offered for sale, shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided.

SEC. 20. The commission shall provide for the furnishing to those who may apply therefor, of any information regarding any investment company or its affairs, which is on file in its office, said commission to charge therefor approximately the cost of preparing such information. All fees collected under the provisions of this act shall be paid into the State treasury on the first day of each and every calendar month, and a complete record of all fees received shall be kept in the office of the commission, and all said fees so turned into the State treasury are hereby re-appropriated to the commission for the purpose of paying salaries and expenses necessary for carrying this act into effect. The members of the commission shall perform the duties imposed upon them and each of them, by the terms of this act, without other compensation than the salaries paid them by the State, but they shall be entitled to receive their actual expenses incurred when absent from the seat of government on business of the commission.

SEC. 21. Every investment company, domestic or foreign, shall file during the month of January in each and every year a detailed statement in such form and containing such information as the commission shall require showing its condition at the close of business on the preceding December thirty-first, and shall at the same time pay a filing fee therefor of one dollar.

SEC. 22. The supreme court upon petition of any person aggrieved may review by certiorari any final order of determination of the commission. The issuance of the writ shall not however, unless specifically ordered by the court, operate as a stay of proceedings.

SEC. 23. Any person or persons who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be imprisoned in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the court.

SEC. 24. Should the courts of this State declare any section or provision of this act unconstitutional or unauthorized, or in conflict with any other section or provision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this act.

SEC. 25. Act one hundred forty-three of the Public Acts of nineteen hundred thirteen and all acts or parts of acts in conflict herewith are hereby repealed.

Approved April 9, 1915.

The appellees in case No. 131 in the court below and all of them dealers. N. W. Halsey & Company and the Continental & Commercial Trust & Savings Bank are Illinois Corporations; the appellees Arthur B. Leach, Ferry W. Leach and George G. Olmstead, are co-partners doing business under the firm name of A. B. Leach & Company. The appellees Henry L. Higginson, J. J. Storrow, Francis L. Higginson, Jr., George C. Lee, N. Penrose Hallowell, Hugh C. Levick, Daniel Shaw, James Sheldon, Francis W. Allen, are co-partners doing business under the firm name of Lee, Higginson & Company. Each and all of these appellees (plaintiffs in the court below) are non-residents of the State of Michigan. The appellee in case No. 132 in the court below, The Weis Fibre Container Corporation, is a non-resident corporation organized under the laws of South Dakota.

The appellant, Frank W. Merrick, is the Commissioner of Banking of the State of Michigan; the appellant, John W. Haarer, is the State Treasurer of the State of Michigan; and

the appellant, Grant Fellows, is the Attorney General of the State of Michigan, they, under the law, being the members of the Michigan Securities Commission created by said Act.

Numerous intervening petitions were filed both before and after the Order granting the injunction had been allowed. Each and all of the plaintiffs in the court below and the intervenors either are at the present time engaged in the sale of stocks, bonds and securities covered by the Act in question, or are desirous of engaging in such business in that State. Most of them are dealers within the provisions of the Act, while some of them, like the Weis Fibre Container Corporation, are issuers of stock within the provisions of the Act in question.

Plaintiffs in the Court below filed their bills to restrain the Commission from enforcing the provisions of the Act as against them upon the ground of its invalidity. The cases were consolidated and heard before Circuit Judge Denison and District Judges Tuttle and Sessions who held the Act invalid and restrained its enforcement against the plaintiffs and the intervenors.

The specific objections to the Act in question are numerous and cover several pages of the record. They may be summarized, however, and discussed under the following heads:

(1) That the title of the Act is defective and offends the provisions of Section 21 of Article V. of the Constitution of the State of Michigan.

(2) That the Act delegates legislative and judicial powers to the Commission and therefore offends Article IV. of the Constitution of the State of Michigan.

(3) That the Act in question does not provide due process and therefore offends the 14th amendment.

(4) That the exemptions found in Section 3 make the Act class legislation.

(5) That the Legislation is beyond the police power reserved in the State.

(6) That the Act offends the commerce clause of the Constitution in that it regulates and levies a direct burden upon interstate commerce.

The learned Judges who heard the motion for the temporary injunction held that the legislation was beyond the police power of the State and infringed the commerce clause of the Constitution and did not pass upon the other questions raised. We assume, however, that each and all of the objections made to the Act will be here urged, and we shall, therefore, discuss them under their respective heads.

ARGUMENT.

I.

TITLE OF ACT.

Scarcely an Act is assailed in the Michigan courts that it is not claimed that the Act offends Section 21 of Article V. of the State Constitution. The ground of defective title has probably been urged more frequently upon the State Court than any other provision of the State Constitution and there is a wealth of decisions on that subject.

Section 21 of Article V. the provision of the Constitution that is invoked in this connection, reads insofar as it is material here, as follows: "No law shall embrace more than one object which shall be expressed in its title." The purpose of this constitutional inhibition has been repeatedly declared by the Supreme Court of the State. In the comparatively early case of

People vs. Mahaney, 13 Mich. 481,

the court has under consideration a measure providing for the

establishment of a police government for the City of Detroit. Among other objections to the validity of the measure it was urged that it embraced more than one object in contravention of the constitutional requirement. Speaking through Mr. Justice Cooley, the court said, in part:

> "But it is insisted that the whole law is unconstitutional and void, because in violation of section twenty of Article IV of the constitution, which provides that 'no law shall embrace more than one object, which shall be expressed in its title.' The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it."

It would seem that this statement by Judge Cooley as to the purpose of the constitutional restriction in question constitutes a sufficient answer to the claim that Act 46 of 1915 embraces more than one object. Certain it is that the provisions of the measure were not brought together for the purposes suggested in the language above quoted, nor can it be said that "subjects diverse in their nature and having no necessary connection" have been incorporated therein. While it would undoubtedly have been competent for the legislature to have split up this Act into two or more measures, it is obvious, we believe, that it was patently undesirable so to do. The law-making body had before it a single proposition and it desired to adopt a single measure that should cover the entire subject-matter.

The object of the Act in question was clearly to prevent fraud in the sale of stocks, bonds and other securities and to regulate such sales with that end in view. The title of the Act clearly imports such purpose and those provisions which are germane to the general object sought to be attained are clearly within the title.

People vs. Brooks, 10 Mich. 98.

In this case it was said by Mr. Justice Montgomery (p. 100):

> "It is contended that the title expresses the purpose to protect fish, the purpose to protect persons engaged in fish culture, and the purpose to regulate fishings. It is perfectly evident from the title that the Act has only one general purpose, which is to regulate fishing. It is true that, included in the general purpose, is that of protecting those incidentally deriving benefit from such regulation. The Act does not infringe this constitutional provision."

It was said by the Court of last resort of the State, in

Attorney General vs. Weimer, 59 Mich. 580, 587;

"We do not think the Act in question obnoxious to Section 20 of Article IV. of the Constitution.

The object of this section is clearly and well stated by Mr. Justice Cooley, in the case of People v. Mahaney, 13 Mich. 494, which was to prevent 'the practice of bringing together into one bill subjects diverse in their nature and having no connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits.' It was not designed by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiply their numbers; but it was intended that in every case the proposed measure should stand upon its own merits, and that the Legislature should be fairly notified of its design when required to pass upon it."

In the case of

Russell vs. Heth, 98 Mich. 472;

It was said that an Act, the title of which was: "An Act to revise the laws authorizing the business of banking, and to establish a banking department for the supervision of such business," was an Act with a valid title, and that while the subjects covered by the Act might have been put in separate bills, it was unnecessary to its validity.

One of the earlier cases, that of

Kurtz vs. People, 33 Mich. 279-282

Has this question under consideration, and it was there said by Mr. Justice Campbell:

> "Nothing but our respect for what we understand to be the doubts of some judicial officers in regard to this statute, has induced us to deem it proper to do more than refer to the numerous cases heretofore decided on the meaning of the constitutional provision. It is a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the obstensible purpose of the statute as entitled. But it is not designed to require the body of the bill to be a mere repetition of the title. *Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated by the title.* It would not be profitable to discuss those extreme cases where the adaptation of means to ends is so far-fetched and unnatural as to be directly and palpably misleading. The case presents, in our view, no such difficulties."

We wish to call attention particularly upon this matter to the case of

> Jewell Theatre Company v. State Fire Marshal, 178 Mich. 399;

Act 257 of the Public Acts of 1913 relative to the construction and operation of moving picture theatres was there involved. It was urged there, as here, that the Act had more than one object, that it sought on the one hand to prescribe requirements that must be observed by moving picture shows, and on the other, to enlarge the powers of a certain State officer. In disposing of the objection, the Court said, speaking through Mr. Justice Ostrander:

> "The Act in question embraces a single object which is expressed in its title * * * Its object is to save human lives and property by prescribing where and how moving picture shows shall be conducted. There is nothing in the Act which is not calculated to accomplish its object, nothing which is not germane to the legislative purpose expressed and suggested in the title."

We believe that this language is particularly in point in the case at bar. There, as here, the legislature sought to cover the subject-matter of a specific proposition before it by the provisions of a single enactment.

We wish to call the attention of the Court also to the following decisions:

> City of Detroit v. Railway Co., 63 Mich. 712;
> Attorney General v. Supervisors, 71 Mich. 16, 22;
> Toll v. Jerome, 101 Mich. 468, 471;
> Grimm v. Secretary of State, 137 Mich. 138;
> Reed v. Auditor General, 156 Mich. 208.

We therefore submit that the law is not subject to the objection that it offends Section 21 of Article V. of the Constitution of the State of Michigan, but that each and every provision of the Act is germane to the object expressed in the title.

II.

DELEGATION OF LEGISLATIVE AND JUDICIAL POWER.

The Michigan Constitution contains the usual provision on the division of the powers of government. Article IV. of the Constitution of that State provides as follows:

> "Section 1. The powers of government are divided into three departments: The legislative, executive and judicial.
>
> Sec. 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."

It was urged in the Court below, and undoubtedly will be here, that this Article of the State Constitution is infringed by the creation of the Michigan Securities Commission, the granting to that Commission of the right to make rules and regulations, and the conferring upon that Commission power to determine, upon inspection and investigation, whether the proposed issue of stocks, bonds or securities are of fraudulent character. The Act in question directs the Commission to disapprove the sale of securities if they are fraudulent or their sale would work a fraud upon the purchaser. In other words, the Commission from its investigation is to determine the fact as to whether such securities are, or are not, of a fraudulent character and upon the determination of that fact rests the operation of the law. If they are fraudulent the law prohibits their sale and directs the Commission to disapprove them; if they are not fraudulent the law permits their sale and directs the Commission to approve their sale. This is not a delegation of legislative power nor the delegation of judicial power. It is creating a Commission to find the facts and then upon the finding of fact the law operates. As was well said, in

Lockes Appeal, 72 Penn. State 491, 498,

> "Then the true distinction I concede is this: The legislature can not delegate its power to make a law but it can make a law to delegate a power to determine

> some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government."

The objection was made in the Court below that no fixed standard for the guidance of the Commission was found in the law. How absolutely impossible such a thing would be must be apparent, and how readily the law could be evaded if a fixed standard was present in the Act goes without saying. The varying and changing schemes of fraud are as numerous and as varied as the operation of different minds can make them. As was said by this Court speaking through Mr. Justice McKenna, in

> Miller vs. Strahl, 239 U. S. 426,

in construing an ordinance requiring inn-keepers in case of fier "to do all in their power to save such guests and inmates:"

> "Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary."

See also

> Nash vs. United States, 229 U. S. 373;
> Jasnowski vs. Connelly Judge, 158 N. W. R. 229.

It is too late in the day to insist that the power given to administrative boards, commissions and officers to determine question of fact and to make proper administrative rules is the delegation of legislative and judicial power. Practically every new Board that has been created with power to determine facts has been assailed upon these grounds and the courts with unanimity have declined to sustain their conten-

tions. It will be unnecessary, as we view it, to cite all, or any considerable number of these cases.

Union Bridge Company vs. United States, 204 U. S. 364;

may be regarded as typical of the cases where an administrative officer is authorized to determine the fact as a basis of administrative action. In this case the Court had under consideration the provisions of the River and Harbor Act of 1899, which provided for the removal or alteration of bridges which unreasonably obstructed navigation. The Secretary of War was given the power to determine the fact as to whether such bridges were an obstruction to navigation after giving the parties an opportunity to be heard. It will therefore be seen that upon the finding of the Secretary of War that a bridge was an obstruction to navigation the bridge company would be required to remove such obstruction and would therefore be damaged in many instances to a very large amount, and it was urged that the power to regulate commerce was one of the powers surrendered to Congress by the states and that commerce included, navigation, and that therefore Congress alone could make the determination and could not impose upon an executive officer the duty of ascertaining in what particular cases the obstruction to navigation occurred because there would be a delegation of legislative and judicial power. The court declined to follow such contention but held that the Secretary of War in determining the fact was acting in an administrative capacity and was performing neither legislative nor judicial functions. The early case of the

Railroad Commission Cases, 116 U. S. 307,

which involved the validity of the Mississippi Railroad Com-

mission Act, fully discusses and considers this objection. In addition to those authorities we might cite

Oregon R. & M. vs. Campbell, 173 Fed. 957;
Hubbel vs. Higgins, 148 Ia. 36;
State vs. Railway Co., 76 Kan. 467;

and the following Michigan cases:

Kennedy vs. State Board of Registration, 145 Mich. 241;
Michigan Central R. R. Co. vs. Railroad Commission, 160 Mich. 355;
Feek vs. Township Board of Bloomingdale, 82 Mich. 393;
Sherlock vs. Stewart, 92 Mich. 193.

The last cited case involves the question as to the power of the State to delegate to a municipality the determination of the question as to whether a party was a suitable party to conduct a saloon in the City of Grand Rapids. It was said by the Court at page 198:

> "Under this comprehensive police power of the State it is, in my judgment, too clear for argument that the legislature may confer upon municipalities the right to determine the places where saloons may be kept, and to determine that question upon each application. The legislature may also enact that only reputable persons shall be allowed in the business, and may authorize the municipalities to determine the question of fitness. If the State possesses this right, the power to determine these questions must, in the first instance, be lodged in the municipality, or board representing it, or in some other body or court. There is no presump-

tion that the persons charged with this duty will not perform it, or that they will abuse the discretion given them."

It was said by Mr. Justice McKenna, speaking for the Court, in

Grand Trunk Ry. Co. vs. Michigan Railroad Commission, 231 U. S. 457, 465:

"It is too late in the day to question the competency of a State to create a Commission and to give it the power of regulating railroads and necessarily of investigating the conditions upon which regulation may be directed. If a judicial interference is sought with the exercise of such power it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the District Court, on ex parte affidavits. Courts are reluctant to interfere with the laws of a State or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decisions of its tribunals prevented or anticipated unless the necessity for either be demonstrated. Upon these principles the District Court acted, and rightly acted."

The power is given the Commission to determine the question as to whether the issue submitted to it is a fraudulent issue and directs the Commission to approve of such issue unless it finds such fraud. This is the delegation to an administrative board of the power to determine the question of fact whether the issue is fraudulent or not. This is not the delegation of judicial power but is creating a Commission which is given the power of finding the fact, and under such

circumstances it is not a delegation of legislative or judicial power. In the cases cited it has been held that railroad commissions could determine a reasonable rate with no fixed standard. There can be no fixed standard. A wide discretion must be left in the administrative body and permission given to a railroad commission to fix a reasonable rate is as free from a fixed standard as is the power given to the Securities Commission to determine the question of fraud. The only other power given to the Commission which is subject to the same consideration, in part at least, is the power given to the Commission to fix the value of the property, both tangible and intangible, and therefore the amount of stock that may be issued by *corporations* for such property and to require the escrow of promotion stock in corporations; but the State has the right to regulate the manner in which and the conditions under which corporations shall do business in the State. See

Paul vs. Virginia, 8 Wall. 168;
State vs. Stone, 118 Mo. 388;
Continental Company vs. Hattabaugh, 121 Pac. 81;
Railroad vs. Gibbs, 142 U. S. 386.

This doctrine is so well established that it is unnecessary to cite further authorities; but in addition to the inherent right of the State to prescribe the terms and conditions under which corporations shall do business is the fact that it is well known that water in the stocks is put in by the promotor, not the public. A patent of no actual value may be turned in for a large amount of stock. Unless there is some restraint promotion fees and expenses may be put in at any amount. Options on real estate may be capitalized in corporations far beyond their actual worth. The State should limit the amount of stock issued for these purposes as a matter of common honesty; and it is highly proper that the amount to be issued

for these purposes should be fixed by an indifferent tribunal rather than by the promoters themselves.

Experience has shown that the promoters are usually officers in the company and unless restrained from selling their promotion or bonus stock they can readily sell such stock to the man who believes that his money is going into the treasury of the corporation, dispose of their holdings, leave the company without a dollar to do business on, and deprive both company and investors of their money, thus working a fraud on both. Such transactions are very frequent in companies with watered stock and the wisdom of this provision cannot be questioned by any one familiar with corporate financeering; but it is not necessary for us to determine the wisdom of it, the terms and conditions under which a corporation may do business in Michigan is subject to the will of its creator, namely, the State.

There is no force in the contention that there is by this Act any delegation of legislative or judicial functions.

III.

DUE PROCESS.

Section 1 of the Act in question requires the Commission to meet on the first Friday of each month; Section 7 provides for a hearing of the applications that have been filed twenty-four hours before such meeting; Rule 22 of the Commission provides for regular meetings of the Commission each Friday (R. 96), while Section 7 and Rule 22 (R. 96) provide for special meetings at the call of the Chairman. Section 7 provides for two days' notice to applicants of a hearing at a special or adjourned meeting. Section 22 of the Act provides for a review of the proceedings of the Commission by the Supreme Court on writ of certiorari.

We have challenged the attention to these provisions for the

purpose of demonstrating that the Act itself does provide due process. The infirmity in the holding in the Court below, as we view it, lies in the fact that the Court below based its decision upon the erroneous assumption that the law in question is prohibitive because of the fact that the right to sell a given stock to the public is temporarily suspended pending an investigation by the Commission. In this view we respectfully submit the Court was in error and this error permeated the decision. In all regulatory and licensing statutes there must be a temporary suspension of the right to do business until the inspection and investigation is had and the license obtained.

The right to follow any avocation and to conduct any business which is subject to regulation under the police power of the State may be temporarily suspended pending investigation and until the license to do business has been obtained. The right to practice law is so suspended in the State of Michigan as is the right to practice medicine, to practice dentistry, to follow the avocation of barber, horseshoer and many other avocations, all of which are honorable. The right to use public highways is subject to regulation and in practically every State of the Union a license to drive an automobile must be first obtained before the right can be exercised. None of these requirements have ever been deemed to make the law prohibitive and to deprive it of its regulatory character. In other words, the temporary suspension of the right pending investigation, or until the license may be issued, is not a deprivation of that right within the meaning of the 14th amendment.

A law prohibiting the sale of all stocks, bonds and securities would be bad, but this law restricting the sale pending investigation as to their fraudulent character we respectfully submit is good. This distinction was recognized by this Court in the decisions on the Bulk-Sales Act and was clearly pointed out by the State Supreme Court in its first decision involving that Act in

Spurr vs. Travis, 145 Mich. 721, 724.

The Bulk-Sales Act of Michigan in common with other Bulk-Sales Acts required parties selling their stock in bulk to give five days notice to their creditors. The Act was designed to prevent fraud. It was urged that the Act restricting the sale for this five days period was in conflict with the State Constitution whose provision is similar to the 14th amendment. The State Court, however, said:

> "Does the Act conflict with section 32 of Article VI. of the Constitution? It may be conceded that an Act which should prohibit the sale of property of any character, either generally or for a stated time, without any adequate purpose or object, would constitute such an interference with the property and liberty of the individual as is inhibited by this section. The courts have, however, never treated this or similar provisions as prohibitive of legislation in the exercise of the police power which regulates the manner of the use or disposition of property, even though a temporary inconvenience may be suffered by the owner. An illustration of this is afforded by the law providing liens in favor of mechanics. Many other illustrations might be given, but it is, we think, safe to state, as a general rule, that where, in the exercise of the police power, a beneficial result is sought, and legislation is enacted in protection such legislation does not infringe the liberty of the citizen in a legal sense or deprive him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell."

The Michigan Bulk-Sales Act was sustained by this Court in

> Kidd, Dater and Price Co. vs. Musselman Grocer Co., 217 U. S. 461.

We quote the syllabus in this case:

> "It is within the police power of the State to require tradesmen making sales in bulk of their stock in trade to give notice to their creditors and also to prescribe how such notice shall be given, and unless the provisions as to such notice are unreasonable and arbitrary a statute to that effect does not amount to a deprivation of property, abridge liberty of contract or deny equal protection of the law within the meaning of the Fourteenth Amendment; nor is the requirement in the Michigan Sales-in-Bulk Act of 1905 that such notice be either personal or by registered mail unreasonable or arbitrary."

See also

Lemieux vs. Young, 211 U. S. 489.

Upon this same proposition we call the attention of the Court to the case of

Reetz vs. Michigan, 188 U. S. 505.

This case had under consideration the Act creating the Medical Board of the State of Michigan and providing for an examination of applicants who desired to follow the profession of physicians and surgeons in the State of Michigan. The Act by its terms did not provide for notice to applicants but did provide for semi-annual meetings at specified times at the State Capitol. The Act under assault here provides for monthly meetings. The Act under consideration in the Reetz case did not provide specifically for any review of the proceedings of the Medical Board. The Act here assailed does specifically provide for a review of the proceedings of the Commission upon writ of certiorari. It was said by this Court in the Reetz case: (P. 508)

"Neither is the right of appeal essential to due process of law. In nearly every State are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

In Pittsburg, etc., Railway Company vs. Backus, 154 U. S. 421, upon the question whether the right of appeal was essential to the validity of a taxing statute, we said (p. 427):

'Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the State Board, while only the one hearing before the latter Board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so.'

In McKane vs. Durston, 153 U. S. 684, 687, this court declared that a 'review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not a necessary element of due process of law.'

See also

Andrews vs. Swartz, 156 U. S. 272.

But while the statute makes in terms no provision for

a review of the proceedings of the Board, yet it is not true that such proceedings are beyond investigation in the courts. In Metcalf vs. State Board of Registration, 123 Mich. 661, an application for mandamus to compel this Board to register the petitioner was entertained, and although the application was denied, yet the denial was based not upon a want of jurisdiction in the court but upon the merits.

It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semi-annual meetings at specified times at the State Capitol, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the Board a certified copy of his registration under the prior statute, and his diploma from the Independent Medical College of Chicago, Illinois. The latter was returned with a notice from the Board that it had denied the application for registration. When a statute fixes the time and place of meeting of any Board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the State courts to what extent the action of the Board had deprived him of his rights."

In

St. Louis, I. M. & S. Ry. Co. vs. State, 136 S. W. 938.

The Railroad Commission Act of the State of Arkansas was under consideration, and it was urged that the Act was invalid because appellant was deprived of a right of a trial by jury, and it was there said:

> "Appellant contends, however, that it was deprived of a constitutional right by the court refusing to submit the matter to trial by jury upon its demand. No provision is made in the law creating the Railroad Commission and prescribing its powers and duties, nor in the Act of 1907, under which the order for the violation of which appellant was indicted was made by it, expressly or by implication for the trial or review of its acts and orders by a jury on question of fact.

In

> Kirkland vs. State, 72 Ark. 78 S. W. 772 (65 L. R. A. 76, 105 Am. St. Rep. 25),

the Court said:

> "It is true that the Constitution provides that 'the right of trial by jury shall remain inviolate' (article 2, 7); and that no person shall 'be deprived of life, liberty or property without due process of law' (article, Sec. 8); but it is well settled that it is only to cases at common law in which the issues of fact were triable by jury, and perhaps such as are of similar analogous nature, that the guaranty relied upon by the appellants extends. A jury trial is not necessary to constitute due process of law in every case.' (Citing authorities.) The question as to whether or not said order was unreasonable and arbitrary was one of law for the court; it never having been intended that a

jury should pass upon, as a question of fact, whether the exercise of power by the Legislature or by the Railroad Commission under legislative enactment was unreasonable and arbitrary. (Citing authorities.)

We also call attention to the case of

Michigan Central R. R. vs. Powers, 201 U. S. 245, 301;

At the last cited page it was said:

"While there may be no provision for an equalization of railroad with other property it will be perceived that the statute names the time and place for the session of the assessing Board, gives to any person or company interested the right to be heard, and also authorizes the Board to correct the valuation. So that it can not be objected that the railroad companies are precluded from a full hearing in the matter of valuation and, as has heretofore been said by this court, *one hearing is sufficient to constitute due process.*"

See also upon this subject:

Railroad Commissioners vs. Railroad Company, 82 S. C. 418;
Wadley So. Ry. Co. vs. State, 137 Ga. 497;
Paulsen vs. Portland, 149 U. S. 30.

It is provided by the Act in question that non-resident dealers and investment companies who desire to do business in the State of Michigan shall file consent to service of process upon the State Banking Commissioner. This is a reasonable regulation. A provision of the New Jersey Automobile Act

which required non-residents using the highways of that State to file consent to service was assailed in the case of

Cleary vs. Johnston, 74 Atl. 538, 541.

It was there said by the Court:

> "Assuming that the right to use the highways belongs to such non-resident owner, yet it is obviously not an absolute right. The stringent legislative restrictions upon the use of the highways by automobiles —which restrictions have received judicial approval— exhibit the fact that the automobile is regarded as a dangerous engine, if used otherwise than under the control provided for by the Legislature. It is apparent that these restrictions upon the manner in which highways shall be used by automobiles can only be made effective by penalties, and the penalties can only be enforced by reaching the owners of such machines. A provision for impounding the machine itself would be valid, but while valid, would be ineffacious, because the speed of the automobile is such that in most instances the machine itself would escape arrest. Resident owners can be reached by service of process within this state, while non-resident owners of course, unless by voluntary appearance, are immune from service. Thus while legal proceedings to enforce the penalties for violating the automobile law can be taken in the courts of this State as against residents, yet, as to non-residents, in the absence of a provision like the one in question, such enforcement would mean numerous suits in other States in the Union from New York to California, or perhaps in other continents. In view of the present need of a vigorous enforcement of these laws for the protection of all other users of the high-

ways, I am of the opinion that the condition imposed that a man who proposes to use our highways for motoring shall agree to submit himself to the courts of the State into which he comes, so far as concerns matters growing out of such use, is neither unconstitutional nor unreasonable. In respect to the point that this burden is imposed upon non-residents and not upon residents, and so unconstitutional inequality is created, it is sufficient to say that both residents and non-residents are placed upon the same footing. Both are made amenable to the laws of the State whose highways they are using."

IV.

CLASSIFICATION.

It will undoubtedly be urged that the legislation in question is defective because of the classification. This objection is based upon the exemptions which are found in Section 3 of the Act. It should be said at the onset that unless the Court can say clearly and without doubt that there is no reasonable grounds for the classification the Act can not be held invalid on that ground. It was for the legislature to determine in the first instance the character of securities that should be subject to the operation of the law and unless the classification is wholly arbitrary and the Court can say that it is without any reasonable basis, the classification is good. We shall under the discussion of the police power of the State cite many cases which not only involve the question of police power, but also involve the question of classification and of interstate commerce. We know that each case cited will be considered for all that it passes upon without citing the same under each separate head. The Constitution of

California which in its classification only mentions sales of stocks on margin and did not prohibit the sale of stocks outright, was held to be valid. Regulation of dealers in milk without regulating dealers in other food supplies was held to be valid. In other words, it was for the legislature to determine to what extent the legislation should go and unless that determination is arbitrary and the Court can say that it is without foundation the classification must stand. The language of Mr. Justice McKenna in a comparatively recent Michigan case is quite pertinent here. We refer to the case of

Citizens Telephone Co. vs. Fuller, 229 U. S. 322, 331.

At the last cited page Mr. Justice McKenna said:

> "Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney vs. New York, 222 U. S. 525, 536. The State is not bound by any rigid equality. This is the rule—its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' Sec. 228 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'"

While the question involved in the telephone case was a question of taxation, and while it may be said that greater latitude is allowed so far as classification is concerned in taxation matters than in other matters, the language however has a very forceful meaning here.

Let us take up the exemptions involved in Section 3 and see if there is any ground for the classification. Or, to state it otherwise, and more properly, is the classification so arbitrary as that the Court may say that it is without foundation or without any reasonable basis? If so, then such exemption would be void but the balance of the Act would stand. The exemptions are:

(a) Governmental Bonds. There can be no reason why the bonds of the United States, the various States of the Union, or the municipalities should be subject to inspection. They are all issued pursuant to the provisions of law and we have not heard of any one being defrauded who purchased such bonds.

(b) Unsecured commercial paper. We understand that this exemption, together with ("h") are the ones principally aimed at in the objection that has been made by counsel and it is contended by counsel that the term "unsecured commercial paper" applies only to that paper which is neither accommodation paper or endorsed paper. No such construction is given this section by the Commission or by the parties who drew this Act; nor do the terms of the Act bear out such construction. Unsecured commercial paper as we view it is that character of paper which is not secured by real estate or other mortgages but is the ordinary paper which the business man puts into his bank; it may bear his name alone, it may have an accommodation maker, or it may be endorsed paper. None of such paper is regulated by the provisions of this law. One of the reasons for this exemption it might be said was the fact that under the law of 1913 the District Court construed the Act to mean that the business man could not go to his banker and borrow upon his own paper extending beyond twelve months without submitting the same to the Securities Commission. This construction we contended then, and do now, was an extremely forced construction. The

matter of borrowing money from the bank was a matter of private contract and it was not deemed to be within the purview of even the old Act, but in order to clarify that situation so that there might be absolutely no question about it and that it should not apply to the ordinary borrowing of money, the exemption hereinbefore mentioned was put in the Act in question. It was inserted so that there could be no question about the proposition. The former Act it was insisted was invalid because it did not exempt unsecured paper, and this Act is claimed to be invalid because it does not exempt unsecured commercial paper. If in the wisdom of the Legislature the degree of evil or the chance for fraud in the sale of unsecured commercial paper was less than the evil or the liability of fraud in the sale of bonds secured by real estate mortgage, then it was within the province of the Legislature to make such distinction. As was said by this Court, as we shall later challenge the attention of the Court: "Legislation which regulates business may well make distinctions dependent upon the degree of evil." With that as the rule it was within the province of the Legislature to make this distinction. Taking the Act from its four corners it bears the construction we contend for, namely, that the Act in using the term "unsecured commercial paper" used such term to distinguish the ordinary commercial transaction from bonds which are secured by mortgage. If the Act is capable of two constructions that should be given it which gives it life, validity and vitality rather than that construction which renders it defective, unconstitutional and void. In other words the spirit rather than the literal words may sometimes be used. As St. Paul in his epistle to the Corinthians said "For the Letter killeth but the Spirit maketh alive." (2 Cor. III 6.)

(c) Securities which are passed by the Michigan Railroad Commission or Commissions having similar powers. There ought not to be any necessity for an examination of the same

security by two State Boards. Therefore, there was good reason for this exemption.

(d) Securities of State or National banks or trust companies, or building and loan associations. These institutions are regulated by other departments. The State banks and trust companies by the Banking Department; National Banks by Federal authorities; Building & Loan Associations through the Secretary of State's office. There is no reason for the duplication of investigation.

(e) Securities of corporations not for gain. Stocks in companies that are engaged in no commercial enterprise may make no profits and can not be regarded as of the blue sky character. No one purchases a stock in a club or political, charitable, education or benevolent corporation except for the purpose of membership and no frauds are perpetrated in dealing in this class of stocks.

(f) Michigan mortgages where the entire mortgage goes with the Note. These are the ordinary safe loans. The owner of such a mortgage has the absolute control over it. If it is not paid he can institute foreclosure proceedings himself. The sale of Michigan real estate mortgages has not, so far as we have been able to learn, been made a vehicle for fraud in the State of Michigan; they are usually dealt in locally; the purchaser of a real estate mortgage or a mortgage secured by personal property, in probably nine hundred ninety-nine cases out of every thousand knows the property, it lies under his very eyes. While mortgages which are given to secure large bond issues, or upon property in a distant State present an entirely different situation. The property is far away, the opportunity for fraud much greater. If it is a trust mortgage the owner of a bond is one of many; he can not control foreclosure proceedings except by expense out of proportion to his holdings and in many cases not at all. The opportunity for fraud is much greater, the opportunity for investigation of his security much less.

(g) Increase of stock sold to stockholders and stock dividends. Stock purchased by a stockholder in a company in which he is interested is stock in a company with which he is familiar. He knows the value of the property, he knows the value of the stock. There is little or no opportunity for fraud.

(h) The authority is granted to the Commission to approve the standard manuals of financial satistics. This, too, is made much of by the defendants. These standard manuals are the manuals used by every bank in the country as a basis for investment. In these manuals are found the stocks that are dealt in daily on the New York, Chicago, Boston and Detroit Exchanges. The information furnished in these Manuals is as full and complete as is possible attainable. These stocks are dealt in by the sophisticated, by people who deal in them with their eyes open, and there is no showing here, and can be no showing, that great frauds have been perpetrated in the sale of such standard stocks as the New York Central, Pennsylvania, Atchison, Calumet & Hecla, Copper Range and the thousands of stocks that are dealt in on these various exchanges and dealt in by men who deal with their eyes open. But under the Act in question the Commission is given the power to suspend the sale of any of these stocks, to examine and investigate them and to prohibit their sale.

Under this head attention should be challenged to certain allegations of the bill and to statements in the affidavit filed in the Court below. Section 28 of the bill (R. 10) alleges that the Commission created under Act 143 of the Public Acts of 1913 approved certain Manuals. There is no allegation with reference to the approval of Manuals by the Commission created by Act 46 of the Public Acts of 1915 (the Act here assailed). In this section it is alleged that the Standard Statistics Bureau Daily Bond Service and the Standard Statistics Bureau Daily Stock Service were approved. It is further alleged in Paragraph 29 (R. 11):

"That as to certain of said so-called manuals, to-wit, the 'Standard Statistics Bureau Daily Bond Service' the avowed purpose thereof is the supplying of all available information as to securities. That said 'Services' supply information as to failing concerns and as to fraudulent securities as matters of information to their clients and the approval of all of said 'Service' is, therefore, an approval of such fraudulent securities, such failing and insolvent investment companies and securities as well as of solvent investment companies and securities which are valuable and will result in profit to the purchasers thereof."

The affidavit of the members of the Commission is found on page 97 of the Record, and contains the following statement:

"Deponents further say that said Commission is a subscriber to reporting agencies and obtain and receive reports from such reporting agencies; but that none of said reporting agencies, nor the reports of said reporting agencies are treated and regarded as manuals, and that the companies reported in such reporting agencies are not automatically approved by said Commission; nor are the stocks, bonds or other securities reported by such reporting agencies regarded by said Commission as exempt under the provisions of said Act, but that such reporting agencies are used by said Commission to get information in the same manner and in no other manner than such reporting agencies are used by business houses who are subscribers thereto."

It will therefore be seen that the Standard Statistics Service is a reporting agency similar to Dunn and Bradstreet, and that while the Securities Commission used that service to get information with reference to the companies and securities

which are reported in this Service as the ordinary business man uses Dunn and Bradstreet, for the purpose of getting such information as may be available, it does not automatically approve the securities about which it obtains such information.

The only other exemption (i), exempts stocks that were approved under the former Commission. There is no reasonable grounds for saying that these stocks should be again submitted to a commission because whether the former law was good, bad or indifferent, an examination was had under its terms and it is fair to assume that the public officials did their duty and that such stocks were properly approved.

The State has the right to make distinction; the State has the right to classify; the State has the right to select subjects upon which it will legislate and so long as that legislation is not arbitrary, and so long as the Court can not say that the classification has absolutely no reasonable foundation, the legislation is good; recognizing the right to classify, which is recognized by all courts the country over, the objects of the classification and what classification shall be made must rest primarily with the Legislature subject only to review by the Courts when it can be clearly said by the Court that there is no basis for the classification. In other words all doubts must be resolved in favor of the validity of the legislation instead of against the legislation. We will now challenge the attention of the Court to some of the authorities.

Engle vs. O'Malley, 219 U. S. 128.

In this case the question of classification was involved and, citing the Worst case in the 207 U. S., it was held: "Legislation which regulates business may well make distinctions depend upon the degree of evil."

The case of

Brodnax vs. Missouri, 219 U. S. 285

Also had the question of classification under consideration, and it was held that the classification of the Missouri Brokers Acts was a valid classification.

In

Quonk Wing vs. Kirkendall, 223 U. S. 59

The court had under consideration a statute of the State of Montana which exacted a license fee of hand laundries and which exempted steam laundries and did not apply to those so engaged where not more than two women were employed. It was held, distinguishing the Yick Wo case, that the classification was valid. To the same effect see

St. Louis Consolidated Coal Company vs. Illinois, 185 U. S. 203.

Bradley vs. Richmond, 227 U. S. 477;

Was a case involving classification. In this case the Court followed the language of the Supreme Court of the State of Virginia, quoting it as follows:

> "In order to render the classification illegal the party assailing it must show that the business discriminated against is precisely the same as that employed in the class which is alleged to be favored."

Griffith vs. Connecticut, 218 U. S. 563;

An exceptionally well reasoned case on the question of classification and other points herein is

Brady vs. Mattem, 125 Iowa 158;

Upon the question of classification we quote the syllabus on the subject:

"Classification on a reasonable basis of subjects within the police power is within legislative discretion and a reasonable selection which is not merely arbitrary and without real difference does not deny equal protection of the laws within the meaning of the 14th Amendment."

It was said by Chief Justice Chase, in

Veazie Bank vs. Fenno, 8 Wall. 533;

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the Judicial can not prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibilty of the Legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporation, it cannot, for that reason only, be pronounced contrary to the Constitution."

V.

POLICE POWER.

It is further urged that the legislation here involved offends the rights of these defendants guaranteed under the 14th Amendment in that it abridges their privileges and immunities as citizens of the United States. In short, it is their claim that they are conducting a lawful business, that the right to

conduct such business is property, and that liberty of contract and liberty of transacting such lawful business is guaranteed them by the 14th Amendment, which rights the State can not infringe. In other words, that the legislation is beyond the police power of the State. The police power of the State is reserved to it and unless the legislation in question transcends the reserved right of the State and is beyond the police power of the State it is valid and not in conflict with the 14th Amendment. The close constructionists for a great many years, and even at this date, insist that the police power of the State is limited to legislation promoting health and good morals alone, but this Court long ago recognized that the police power of the State was much broader than the confines of such limits, and that it included not only the right to legislate with reference to the public health and the morals of the State but that it also included legislation which had for its object the convenience, the welfare and the prosperity of the People of the State, and that any legislation, subject to other limitations of the Constitution, which was productive of the health, morals, convenience, welfare and prosperity of the State was within the police power of the State, and that the Courts would not set aside such legislation unless the Court could say clearly and beyond doubt that such legislation bore no reasonable relation to the object sought. All Courts have been loath to definitely limit the police power or to circumscribe its exercise within fixed and definite rules, but have realized that with changing conditions, with new problems confronting the Legislature for solution, the State must be given a wide latitude in the exercise of its discretion in order to legislate to meet the growing and changed conditions.

This legislation does not deal with specific private contracts; it is not designed to, and does not, legislate with reference to individual contracts; it is not single instances but with a general business. If A sells to B a block of stock that he owns it is a matter of private contract in which it might be said

that the public had no interests and therefore such contracts are not subject to legislation under the police power. But if A goes into the business of selling stock, then it is within the police power of the State to regulate such business and inspect the wares offered to the public. A manufacturing plant engaged in the manufacturing of a given commodity is not regulated in that business by the Act in question; it may manufacture its product, borrow money of its banker or others without let or hindrance, but when it goes into a business other than manufacturing and goes into the business of selling its stock *to the public*, it then becomes an investment company under the Act assailed and subject to its provisions. As to the plaintiffs and intervenors who are dealers and who engage in the business generally of selling stocks to the public, the law may be regarded as imposing a vocational tax. The right of the State to levy such vocational tax is now beyond cavil. As to the investment companies it is a regulatory and inspection measure designed solely to prevent fraud. In short it is the *business* of selling securities that is regulated and the inspection of the wares *offered to the public* that the law covers.

As was said by Mr. Chief Justice Fuller, in

Williams vs. Fears, 176 U. S. 270, 375,

in determining the validity of a statute of the State of Georgia with reference to employment agencies:

> "It would seem, moreover, that the business itself is of such nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that if that business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be

legitimately protected. Nor does it appear to us that the objection of unlawful discrimination is tenable."

So here we say that the enactment of the legislation under consideration has for its object the improvement of the economic conditions affecting the community at large; that we are not dealing with a single instance but that we are dealing with a general business. Michigan has become a great industrial, and manufacturing State; millions of dollars of stocks in industrial, manufacturing, real estate and mining ventures are being issued monthly. The opportunity for fraud is great; the success of the Ford plant is an excuse for the issuance of millions of dollars of stock in new automobile plants that exist only upon blue prints and in the minds of the incorporators and promoters. Calumet & Hecla is going to be duplicated by every mining proposition; and so we might multiply the propositions that would be foisted upon the public but for this legislation, because the successful manufacturer is expected to be duplicated by every promoter with one lath and an option on sufficient ground to build a factory. It is a mistaken notion, if such a one exists, that blue sky only exists in mining stocks and oil wells. Right now in the State of Michigan without the operation of the Michigan Securities Commission every hamlet, every city and the country cross road would be infested with smooth tongue salesmen offering fly-by-night stock in automobile plants, manufacturing enterprises, real estate companies, with but one object—the garnering of money from the thrifty with nothing in return therefor. So that it is not the case of a single transaction but, as stated by the Chief Justice, it is a case of the "general business" of offering these so-called securities for sale that the Legislature had before it when it enacted the legislation here in question.

We first challenge the attention of the Court to the case of

Otis vs. Parker, 187 U. S. 606.

In this case the validity of a provision of the State Constitution of California was assailed, the provision being as follows:

> "All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

It was said by Mr. Justice Holmes, speaking for the Court at page 610:

> "With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining State, and mines offer the most striking temptations to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was designed to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from Connelly vs. Union Sewer Pipe Co., 184 U. S. 540. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws."

We next call the attention of the Court to the case of

Brodnax vs. Missouri, 219 U. S. 285.

In this case a statute of the State of Missouri regulating brokers was assailed. While this case may with propriety be cited under other heads of this Brief, we desire to cite it under this subdivision to the following effect: (We quote from the syllabus):

> "In this case, as the statute shows on its face that the subject regulated needed to be regulated for the protection of the public against fraudulent practices to its injury, this court is not prepared to declare that the State has acted beyond its power or the necessities of the case.
>
> While it is the duty of the Federal Courts to protect Federal rights from infringement they should not strike down a police regulation of a State that does not clearly violate the Federal Constitution; they cannot overthrow police legislation because they consider it unwise or inexpedient."

The Court also cites another case coming up from Missouri found in the same volume, and we also challenge the attention of the Court to this case:

House vs. Mayes, 219 U. S. 270.

In the last cited case the Act assailed was entitled: "An Act to prevent fraud in the purchase and sale of grain and other commodities." It was aimed at a custom of the Board which permitted the deduction of one hundred pounds from each carload of grain to equalize the loss from foul stuff in grain. It was held to be within the police power of the State

to pass such an Act, that it did not impair the obligations of contract and was not the taking of private property without due process of law.

The Oklahoma Bank Deposit Act was assailed as being in conflict with the provisions of the Federal Constitution upon the grounds here urged, but it was held that the Act was valid and within the police power of the State. See

Noble State Bank vs. Haskell, 219 U. S. 104.

The Oklahoma statute was also held to be valid when contested by a National Bank. See

Abilene National Bank vs. Dolley, 228 U. S. 1.

It should be borne in mind that the great danger in the sale of securities is that the man of small wages, of moderate wages, of inexperience in financial affairs is the man most liable to be harmed by the sale of fraudulent securities. It should be borne in mind, further, that the general welfare of the community is dependent more upon the general welfare of this class of citizenship than upon the general welfare of the wealthy. A city made up entirely of retired millionaires is never as prosperous as the city made up of active business and laboring men. It is not paternalistic legislation which protects the illiterate, inexperienced laborer because his protection is one of the functions of Government. The State of New York recently passed a law regulating private banking which was assailed upon practically all of the grounds here urged; but the legislation was sustained not only by the State Court but by this Court in

Engle vs. O'Malley, 219 U. S. 128;

We quote from page 136:

"On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the State may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above State laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious indiscrimination. The quasi paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert."

In

Gundling vs. Chicago, 177 U. S. 183,

it was said by Mr. Justice Peckham speaking for the Court at page 188:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly un-

priate means to such prevention. Enactments similar to this act, having for their object the regulation of the manufacture and sale of substitutes for butter, have been sustained by the courts of last resort in many jurisdictions." (Citing authorities.)

The Court in

Gatewood vs. North Carolina, 203 U. S. 531,

passed upon the validity of the so-called Bucket Shop Act of that State and sustained its validity.

An exceptionally able and well reasoned opinion is found in

Schaake vs. Dolley, 85 Kansas 598;

In this case the validity of a statute of the State of Kansas was involved. This statute permitted the State Banking Commission to accept or refuse an application for a license to organize a State bank. Its validity was assailed upon practically all grounds here involved except the question of interstate commerce. The Act was sustained, and we respectfully submit the opinion to the Court.

We also challenge the attention of the Court under this head to

People vs. Wagner, 86 Mich. 594;

In this case an ordinance of the City of Detroit regulating the size of loaves of bread was involved. It was assailed as not being within the police power of the State. It was said at page 600:

"The police power of a State is not confined to regulations looking to the preservation of life, health, good

> order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection."

People vs. Rotter, 131 Mich. 250,

Involved the validity of the oleomargarine Act passed by this State and in common with other States of the union and the Federal holdings. The Act was sustained as a valid exercise of the police power of the State.

The language of the court in

Continental Co. vs. Hattabaugh, 121 Pac. 81,

is significant. It was there said:

> "Judicial opinion is almost unanimous that the State has a constitutional right to enact laws regulating and limiting the right to do business within a State, and the authority for and manner of carrying on such business, and the question is one for each State to settle, and where the Legislature has enacted and prescribed what, to it, are reasonable regulations, this court will be cautious in attempting to discover some imaginary or theoretical reason for annulling such legislation."

The exercise of the police power of the State is not limited solely to regulations pertaining to health, morals or safety of the public. It goes beyond that; it goes to the question of public welfare and public convenience, and legislation by a State which is solely designed to promote *public convenience* is within the police power of the State. We call attention to

L. S. & M. S. Ry. Co. v. Ohio, 173 U. S. 285.

This case had under consideration a statute of the State of Ohio regulating the stopping of trains at certain stations. It was not only assailed as an interference with interstate commerce, but also as beyond the police power of the State. It was said by Mr. Justice Harlan speaking for the Court (292):

> "It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the States, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to the health, morals or safety of the public, and do not embrace regulations designed merely to promote the *public convenience*.
>
> This is an erroneous view of the adjudication of this court. While cases to which counsel refer involved the validity of State laws having reference directly to the public health, the public morals or the public safety, in no one of them was there any occasion to determine whether the police powers of the States extended to regulations incidentally affecting interstate commerce but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the States may legislate with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the National Constitution, nor with any Act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class."

Authorities are then taken up and considered, and Mr. Justice Harland resumes (pp. 296, 298):

"Now, it is evident that these cases had no reference to the health, morals or safety of the people of the State, but only to the public convenience. They recognize the fundamental principle that outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the State, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State constitution, are to be respected and enforced in the courts of the Union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is—to use the words of Chief Justice Shaw—the power 'to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.' Commonwealth v. Alger, 7 Cushing, 53, 85. Mr. Cooley well said: 'It cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.' Cooley's Const. Lim. (6th ed.) p. 715. It may be that such legislation is not within the 'police power' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative exists in each State, by appropriate enactments not for-

bidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government." (Citing authorities.)

The right of the State to exact a license from a broker was sustained by the Supreme Court of Illinois, in

Banta vs. City of Chicago, 172 Ill. 204, 219

We quote from the last cited page:

"It is not urged the ordinance is unreasonable or oppressive in respect of the amount of the license fee, but it is urged the business of a broker is not hurtful to the public peace, safety or morals, and that no other reason can be given why such business should be deemed a proper subject of regulation or prohibition, under the police power or otherwise. It is therefore asserted the city is driven to the position that the ordinance is a revenue measure, and is lawful as such. The terms of the ordinance do not indicate whether the license fee is required for the purposes of revenue or for regulation merely. It is true that in order to be effectual a license

must confer authority to do that which without the license would be illegal; but it does not follow that only such occupations as might be inhibited or regulated under the police power, or for other similar reasons hereinbefore referred to, may be required to take out license in order to legally transact business. The occupation may be lawful in itself and not subject to prohibition in order to compel the taking out of a license, if the purpose is to raise revenue by means of a license fee. (Cooley on Taxation, pp. 596, 597). Therefore the mere facts that the effect of the ordinance is to declare it to be unlawful to transact the business of a broker without license does not indicate whether the purpose is to raise revenue or to regulate and control the business. Mr. Cooley, in his works on Taxation, (p. 597) says that the language of the ordinance, or its terms, may be expected to indicate with sufficient precision whether the license is required for purposes of revenue or for regulation merely, the intendment being that regulation is the object, unless there is something in the language indicating with sufficient certainty that the purpose is to produce revenue. In the view we take of the case it is not material to determine whether the license fee is for revenue or for purposes of regulation. We think it is well settled by repeated decisions of this Court that the State in its sovereign capacity, and the cities and villages of the State by virtue of the grant of the power by the General Assembly, have ample power and authority to impose license fees upon the occupation of a broker and the other trades or occupations mentioned in Section 1 of Article IX. of the Constitution of 1870, for the purposes either of regulation or revenue."

See also upon the subject of police power:

Budd vs. New York, 143 U. S. 517;
Heath & Williams Co. vs. Worst, 207 U. S. 338;
Bacon vs. Walker, 204 U. S. 311.

In the last cited case a statute of the State of Idaho was involved which prohibited the grazing of sheep within two miles of a dwelling house, and it was urged, and authorities were cited, that such legislation was beyond the police power of the State. After considering the cases cited, the Court said (p. 317):

> "These cases make it unnecessary to consider the argument of counsel based upon what they deem to be their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Company vs. Drainage Commissioners*, 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the re-

lation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise on the barren letter of the statute."

Chicago, B. & Quincy R. R. Co. vs. McGuire, 219 U. S. 578,

Involved the right of the State to prohibit contracts between the Railroad Company and its employees limiting liability for injuries made in advance of the injuries received and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract. The Act under consideration was an Act passed by the Legislature of the State of Iowa. We desire to call the attention to it particularly because of the fact that the Court in the opinion quote the language of the Allgeyer case so frequently and so persistently urged upon the Court by Counsel for the appellees and then comments upon the same. We quote what was said by the Court at p. 566:

"It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. Allgeyer vs. Louisiana, 165 U. S. 578; Lochner v. New York, 198 U. S. 45; Adair vs. United States, 208 U. S. 161. In Allgeyer v. Louisiana, supra, the court in referring to the Fourteenth Amendment, said (p. 589): 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation,

and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

We have cited in this brief some of the cases involving the validity of oleomargarine Acts. In all of these cases it has been urged that the business of manufacturing oleomargarine is a legitimate business; that oleomargarine is a healthy food product, which fact has generally been conceded in the prosecutions under these various Acts. It has been urged in these cases, as it is here, that the manufacturer was engaged in a legitimate business; that he had the right to pursue that calling under the Fourteenth Amendment, and that any legislation which interfered with the conduct of that lawful business was violative of his rights thereunder. This legislation has uniformly been upheld as an exercise of the police power, not often upon the ground of health but generally upon the ground of preventing fraud and deception in the sale of such commodity. We desire to call the attention of the Court to one further oleomargarine case, the original one, that of

Powell vs. Pennsylvania, 127 U. S. 678.

We quote commencing at page 684, omitting such comment as may not be important here:

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. * * *

The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;' yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment exercised either in the presence of public opinion or by means of the suffrage.' Yick Wo v. Hopkins, 118 U. S. 370. The case before us belongs to the

latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

We desire to call the attention of the Court to two recent decisions of the Supreme Court of the State of Michigan, one of which has been affirmed in this Court. We refer to

People vs. Brazee, 183 Mich. 259,

affirmed by this Court in

Brazee vs. Michigan, No. 15 Advance Opinions, P. 561;

and

Jasnowski vs. Connelly, Judge, 158 N. W. R. 229,

The first of these cases involved the validity of the private employment agency Act. It was urged by Brazee that this legislation was beyond the police power of the State. It was in-

sisted by us there, as it is here, that the legislation was legislated with reference to a general business not with reference to specific transactions. It was urged there, as is urged here, that while the business was a legitimate business and if honestly conducted worked to the good of the public. So here the brokerage business is a lawful business and if honestly conducted works to the good of the general public. We desire to quote what was said by Mr. Justice Brooke in the Brazee case with reference to the police power:

> "The 'police power' is said to be a power or organization of a system of regulations tending to the health, order, convenience, and comfort of the people and to the prevention and punishment of injuries and offenses to the public. It is the expression of an instinct of self-preservation and characteristic of every living creature, an inherent faculty and function of life, attributed to all self-governing bodies as indispensible to their healthy existence and to the public welfare. It embraces all rules and regulations for the protection of life and security of property. 28 Cyc. p. 652; 31 Cyc. P. 902. It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about 'the greatest good of the greatest number.' Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction."

The second of these cases involved the validity of Act 276 of the Public Acts of 1913 which was designed to prevent fraudulent advertising. It was urged that this was beyond the police power of the State and that the language of the statute "deceptive and misleading" was not sufficiently definite.

As is claimed here a sufficient standard was not set. It was held, however, that the legislation was sufficiently specific.

We also call attention upon this question to

Halter vs. Nebraska, 205 U. S. 34.

This case had under consideration a law of the State of Nebraska prohibiting the use of the American Flag for advertising purposes. In speaking of the police power, Mr. Justice Harland said (40):

> "Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme law of the land, a State possesses all legislative power consistent with the republican form of government; therefore each State, when not thus restrained and so far as this Court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

We also challenge the attention of the Court to the very recent case of

Rast vs. VanDeman & Lewis, 240 U. S. 242,
Tanner vs. Little, 240 U. S. 369,
Pitney vs. Washington, 240 U. S. 387.

These cases involved the validity of various trading stamp Acts, most of which Acts it had been held by the lower courts, both State and Federal, to be beyond the police power of the State and to infringe the commerce clause. The legislation was sustained as against all exceptions. One of the reasons for the exercise of the police power being that the legislation prevented improvident buying, thereby being in the interest of

the prosperity of the public. If it is within the police power of the State to legislate for the purpose of preventing improvident buying we respectfully submit that it is within the police power of the State to legislate to prevent fraudulent selling. We desire also to cite the following cases:

Price vs. Illinois, 238 U. S. 446;
Miller vs. Wilson, 236 U. S. 373;
German Alliance Insurance Co. vs. Kansas, 233 U. S. 389;
State vs. Prince, 77 N. H. 581;
Armour & Co. vs. North Dakota, 240 U. S. 510.

While we have not attempted to cite all of the authorities, or any considerable number of those passing upon the power of the State, still an examination of these authorities will show that the language of Mr. Justice Brooke in the Brazee case is fairly in point as to the exercise of this reserved power in the State. That which bespeaks the good of the public, either the public health, public morals, public welfare, public convenience, the public prosperity, is within the police power of the State and an examination of these authorities demonstrate that it is not necessary that the Court should find that the measure of necessity works to the good of the public health or the public morals or the public welfare, or the public convenience, or the public prosperity. Unless the Court can say that the measure bears no reasonable relation to the subject, the legislation is valid. The argument in all of these cases has been that the business regulated was a legitimate business and beyond governmental control. The fact that the business is a legitimate business in no way relieves it from governmental control. The banking business is an honorable business, but it is subject to regulation, both as to corporate banks and private banks under the authorities cited; the raising of sheep is a legitimate enterprise and has been recognized as such

since David watched over his flocks in Judea, and yet under the authorities cited it is subject to State regulation and State Control. The conduct of an employment agency is a legitimate business but it is subject to control; the conduct of a brokerage establishment similar to that of the Appellees is the conduct of a lawful business, but it is nevertheless subject to control as the Missouri, Illinois and other cases demonstrate. The oleomargarine cases all proceed upon the theory that the product is wholesome but they are regulated to prevent fraud in their sale; the manufacture of fertilizer is a legitimate business, yet it is subject to regulation; the manufacture of stock food is a legitimate business but it is subject to State regulation and State control. And so we might go down the line with the various classes of business legitimate, honorable, if properly conducted, but nevertheless subject to State regulation and State control. So we respectfully submit in the case at bar that the defendants in error while engaged in a business in and of itself legitimate, are engaged in a business that is subject to State regulation and State control. The purpose of the Act as expressed in its title is to prevent fraud. The preventing of fraud is clearly within the police power of the State and the manner and method in which and by means of which that fraud shall be prevented is within the discretion of the Legislature and is not for the Courts to determine. We respectfully submit that the legislation in question is clearly within the police power of the State.

VI.

INTERSTATE COMMERCE.

It is claimed that the Act in question is a regulation of interstate commerce. There is no allegation in the bill, undoubtedly because none could be made, that the plaintiffs in the Court below and the intervenors do not maintain offices and places of business within the State; nor is there any claim made that the stocks, bonds and other securities handled by the plaintiffs and intervenors, and which are brought into the State, are sold in original packages. Indeed it is the claim, as we understand it, of the Appellees and apparently the view taken by the Learned Judges who heard the motion for injunction, that stocks, bonds and securities are Articles of interstate commerce, that it was beyond the police power of the State to enact the legislation in question, and that such legislation levies a direct burden upon interstate commerce and therefore is void. By reason of jurisdictional limits it could hardly be urged, and has not been urged by the Appellants, that the Act in question would operate to prevent the advertisement by any investment company or broker of stocks, bonds and securities in a Chicago newspaper and send the stocks or other securities through the mail to a Michigan customer. It is the claim, however, of the Appellants that parties following the avocation of brokers in the State of Michigan, no matter how small their branch office may be nor where they may reside, who conduct the business within the State of selling stock, bonds and securities, not exempt under the provisions of the Act in question, are regulated by this Act and that the stocks, bonds and securities sold by them and offered for sale by them within the State are subject to the provisions of this Act irrespective of whether such stocks originate in Michigan or are sent into the State from some other State in the Union. In

other words, even though stocks, bonds and other securities may be Articles of interstate commerce, which we shall deny, and while the State may not regulate the sale of such stocks, bonds and other securities where such sale takes place outside the State of Michigan, still if such sale takes place within the State of Michigan unless in original packages the State may regulate such sale, may levy a vocational tax upon the business if such vocation is followed within the State and may inspect the articles offered for sale even though such Articles are brought into the State from some other State in the Union.

We shall discuss the question of interstate commerce under three sub-heads:

(a) Are stocks, bonds and other securities *Articles* of interstate commerce?

(b) May the State investigate and inspect Articles of interstate commerce for the purpose of preventing fraud, and does the commerce clause or any other clause of the Constitution secure to non-residents, or any one else, the privilege of perpetrating a fraud upon the public?

(c) Congress not having legislated upon this subject may the State legislate within its police power, such legislation to be effective until Congress acts?

A.

Are stocks, bonds and other securities articles of interstate commerce? A stock certificate is evidence that the party to whom the same is issued has an interest to the amount named in the certificate in the property of a corporation. It is a muniment of title; it is this and nothing more. It is not a commodity. The property of the corporation is

permamently located; it may be in Michigan or it may be in Alaska. The transfer of the certificate to a Michigan holder does not contemplate that the property of the Corporation will be brought into Michigan in interstate commerce. It is simply the transfer of evidence of title in property permanently located. It is therefore, we respectfully submit, only *evidence* and is not an *article* of commerce. Bonds and other securities are choses in action, evidence of an indebtedness, evidence of a contract to pay money, which contract is regulated by the laws of the State in which it is made. A mortgage is a lien; bonds and mortgages are usually payable where issued and do not contemplate a transfer of any property in interstate commerce. Dealing in securities which are issued in the various States of the Union and are not regulated by Federal law but by the statutes of the State of issue and enforceable only in accordance with the law of such State are not *articles* of interstate commerce.

Early in its history the State of Louisiana imposed a tax upon all money and exchange brokers doing business within the State. One Nathan was engaged in the business of buying and selling foreign exchange. He dealt not at all in domestic exchange; he was proceeded against for failure to pay the brokerage tax of $250.00 and defended upon the ground that he was engaged in interstate commerce. The case is reported as

Nathan vs. Louisiana, 8 How. 73;

And it was then held that while foreign bills of exchange might be instruments of commerce, they were not commerce, and that the State had the right to impose a tax upon all brokers dealing in foreign exchange; and further that the State had the right to tax its own citizens for the prosecution of any particular business or profession within the State. It was there said:

"No state can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on."

The case was followed with approval, in

Paul vs. Virginia, 8 Wall. 168;

In which case the court had under consideration the question as to whether insurance companies were engaged in interstate commerce, and whether the State could regulate them. It was not only held that they were not engaged in interstate commerce and that the State could regulate the manner in which insurance business was conducted, but it was also held that corporations were not persons within the meaning of the Federal Constitution guaranteeing equal protection; that they were an artificial being; that the State which brought them into being could regulate the manner of their conduct of their business and could put such restrictions and limitations about them as it saw fit. In both of these cases the parties complaining were similarily situated to the plaintiffs and the thing in which they dealt, being contracts, were held not to constitute interstate commerce within the meaning of the Federal Constitution.

In

State vs. Stone, 118 Mo. 388,

the Supreme Court of Missouri had the same questions under consideration as in the Virginia case, and held that the State had the right to make such requirements as it saw fit with reference to the conduct of insurance business. The claim of the companies was denied and the right of the State upheld. It was held that non-resident corporations had only such rights as the Legislature saw fit to give them, and that the State had the right to regulate all trades, callings and professions so long as it did not discriminate between citizens. There was no pretense in this case, however, as we understand it, but that the provisions of the insurance laws of the State of Missouri applied alike to resident and non-resident companies; nor is there any pretense that in the law in question there is any discrimination between a resident and a non-resident corporation, co-partnership or individual.

While it will undoubtedly be urged that the lottery case in effect over-rules these decisions we can not accede to such contention. The lottery case as will be remembered was an exceptionally strong case. The opinion was by a divided court (five to four) and it was said in the majority opinion (188 U. S. 353):

> "We now come to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, *at least by Corporations or Companies whose business it is, for hire, to carry tangible property from one State to another.*"

The law under consideration was one to regulate express companies and it was not intimated that either the Nathan case or the Paul case was over-ruled. In the conclusion of the opinion it is said by Mr. Justice Harlan who delivered the majority opinion (363):

> "We decide nothing more in the present case than that lottery tickets are subject to traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States, Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

In other words the Act under consideration was a Federal Act where Congress had spoken on that subject.

B

The purpose of this Act as its title indicates and as its provisions show is to prevent the perpetration of frauds within the State of Michigan through the sale of fraudulent securities. The underlying thought in this legislation being preventative of a perpetration of frauds rather than the punishment after such fraud has been perpetrated. In other words, the underlying principle involved here is the inspection and investigation of securities before a fraud has been perpetrated in their sale, the power of the Commission to disapprove being limited to the sole grounds of fraud. If it be assumed that securities are articles of commerce, can it be said that because an article of commerce is brought in from another State that the commerce clause protects its holder in perpetrating a fraud upon the purchaser? In other words, is the police power of the State so limited in legislating upon the subject of fraud that its legislation upon that subject can apply only to articles produced within the confines of the State? To state the proposition is to refute it. As was said by this Court in

Plumley vs. Massachusetts, supra:

> "Can it be that the Constitution of the United States secured to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of *any*

articles, even those that may have become the subject of trade in different parts of the country?"

The State has the right to pass regulatory and licensing measures even though the articles dealt in are brought into the State in interstate commerce and the State has the power to investigate and inspect articles though produced in a sister State, provided such right is within the police power of the State. We shall challenge the attention of the Court to a few authorities upon this subject:

Hatch vs. Reardon, 204 U. S. 152,

In this case the validity of the stamp tax upon the sale of stocks in the New York market was involved.

The purpose of the Act here involved must be apparent to the court, the purpose being that no one shall be permitted to sell in the State of Michigan and separate the people of the State from their money through the medium of fraudulent mining stocks, oil stocks and other fly by night ventures. The same reason that would give to the Legislature the right to prescribe that in the sale of commodities honest weights and measures should be used, would apply with equal force in the sale of securities, and whether those commodities which are offered for sale are shipped in from a foreign state or not, the State has the right under its police power to provide for an inspection and weighing of those commodities even though those commodities were shipped in in interstate commerce. Not only has the State the right to require the inspection, but it also has the right to demand a fee for such inspection. See upon this question the case of

Coal Company vs. Louisiana, 156 U. S. 590.

The opinion is not a lengthy one, and we refrain from quoting, but request the court to consider it as it bears upon two ques-

tions involved in this case. (1st) Interstate commerce; (2nd) The police power of the State.

We also call attention to the case of

Savidge vs. Jones, 225 U. S. 501.

This is a very recent case and involved the validity of an Indiana statute aimed towards pure food, and among other provisions required the placing of stamps upon stock food and the filing with the State chemist of the formula used in its composition. It was held that the Act was not violative of the commerce clause of the Federal Constitution; that the Company was not deprived of due process of law in requiring the formula to be disclosed, and that it was a valid exercise of the police and taxing power of the State. It should be said in passing that upon the record the question of wholesomeness or want of wholesomeness of the compound was not involved so that it was not upheld by reason of its being a health measure.

The same conclusion was reached in

Standard Food Company vs. Wright, 225 U. S. 540;

Where a similar statute of the State of Iowa was involved and was likewise sustained.

We shall also call the attention of the Court upon the same proposition to

Singer Manufacturing Company vs. Wright, 33 Fed. Rep. 121.

It should not be assumed that every commodity which has come into this State by interstate shipment is immune from all State legislation by reason of the commerce clause in the Federal Constitution. To so hold would in effect concede that

the State had surrendered its police power to Congress under said clause. Nor should it be held, nor has it been held, that those regulations within the police power of a State are invalid simply because incidentally interstate commerce may be affected; nor is the state precluded from legislating where Congress, as in this matter, has failed to act.

We desire to cite some further cases which might be cited under a later head in our brief, but in which it has been insisted that the State was powerless to act. Many of these cases have been where Congress has not spoken on the subject, while others are police regulations upon interstate carriers which have been held not to be repugnant to the commerce clause of the Federal Constitution. We first call attention to

R. R. vs. New York, 165 U. S. 628.

The Act under consideration was a regulation with reference to the heating of passenger cars and directing guards and guard posts placed on railroad bridges and trestles and the approaches thereto. It was said by Mr. Justice Harlan speaking for the Court, page 631:

> "According to numerous decisions of this Court (some of which are cited in the margin) sustaining the validity of state regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, (Gibbons

vs. Ogden, 9 Wheat. I, 211,) the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people. The statute in question had for its object to protect all persons traveling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the State to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the State is competent to legislate, namely, the personal security of those who are passengers on cars used within the limits. Why may not regulations to that end be made applicable, within a state, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such State? Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several

states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

In

Nashville M. C. Ry. Co. vs. Alabama, 128 U. S. 96;

The court had under consideration a local act which required locomotive engineers and other persons employed by a railroad company in a capacity which calls for ability to distinguish and discriminate between color signals, to be examined from time to time by a State tribunal and which required the company to pay for such examination. It was held to be valid legislation, not depriving the company of property without due process of law, and not in conflict with the commerce clause of the Federal Constitution even though it indirectly affected common carriers in interstate commerce.

See also

Smith vs. Alabama, 124 U. S. 465.

In

Hennington vs. Georgia, 163 U. S. 299,

The Court had under consideration an Act forbidding the running of freight trains on Sunday. It was insisted that this interfered with interstate commerce and was void. The Act however was sustained upon the theory that it was a proper police regulation within the power of the State to enact.

Emert vs. Missouri, 156 U. S. 296

Involved a hawkers and peddlers Act, in which there was no discrimination between domestic and foreign peddlers (nor is there any discrimination in the Act in question). It was held that the Act was not repugnant to the commerce clause of the Federal Constitution.

State vs. Harbourne, 70 Conn. 484.

In this case the prosecution was brought for violating a statute of the State of Connecticut prohibiting gambling and wagering. The money was deposited within the State to be transmitted by telegraph outside the State and it was urged that such transmission of such money outside the State was interstate commerce and therefore could not be regulated by local legislation. The Court declined to follow the contention and sustained the validity of the Act.

Patapsco Guano Co. vs. North Carolina, 171 U. S. 345.

In this case a statute of the State of North Carolina requiring the inspection and regulating the sale of commercial fertilizer was attacked as being in contravention of the Commerce Clause of the Federal Constitution and as beyond the police power of the State. The Act was sustained as against both of these contentions. At page 354 it was said:

> "Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, *such laws are applicable to articles imported into, as well as to articles produced within, a State.*"

It was further said at page 361:

> "The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton was intended merely to

defray the cost of such inspection. It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of State inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce.

In any view, the effect on that commerce is indirect and incidental, and 'the Constitution of the United States does not secure to any one the privilege of defrauding the public.'"

Upon the same question we also call attention to

Crossman vs. Lurman, 192 U. S. 189.

In this case a law of the State of New York prohibiting the sale of adulterated foods and drugs was involved, the facts being substantially that the parties had entered into an agreement, Crossman & Bros. being the sellers, and Lurman & Company the purchasers. The sellers lived in New York, the purchasers in Baltimore. Five hundred bags of Rio coffee was agreed to be sold by Crossman & Bros. to Lurman & Company; the coffee was to be shipped to New York by a designated steamer and from there shipped to Baltimore. The contract was a New York contract and it was insisted that the New York pure food drug Act was in restraint of commerce and therefore void. The Court, however, held that the regulation was within the police power of the State and the *Plumley* case was cited with approval, and it was held not to be in restraint of interstate commerce. Both this case and the case last cited by us were cases where inspection laws

were attacked. The right of the State to pass such inspection laws and inspect commodities not only of domestic commerce, but also of interstate commerce and foreign commerce, was upheld and sustained.

The legislation was upheld as has all similar legislation been upheld and in none of the cases was the question of the wholesomeness of the product involved, but the general right of the State to pass inspection laws upon wares that were offered for sale to the public generally has been recognized and upheld as not infringing the commerce clause of the Federal Constitution and is within the police power of the State.

Silz vs. Hesterberg, 211 U. S. 31.

This case involved the game law of the State of New York, the respondent having in his possession during the closed season one golden plover and one imported grouse, both shipped to him from a dealer in London. They were taken during the open season and were shipped to him in foreign commerce. He contended that the State law prohibiting him from having this game in his possession deprived him of his property without due process of law, and also was in restraint of commerce. It was said (p. 40):

> "It is next contended that the law is an attempt to unlawfully regulate foreign commerce which, by the Constitution of the United States, is placed wholly within the control of the Federal Congress. That a State may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exertion of their police power, not in conflict with laws of Congress upon the same sub-

> ject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."
>
> Allen vs. Riley, 203 U. S. 347,

By analogy is applicable here. The State of Kansas had passed a law that, before sale of patent rights, an authenticated copy of the letters patent should be filed in the office of the County Clerk. It was urged that this was an infringement upon the power of Congress to regulate granting and sale of the patents, but it was held—

> "While a State may not pass any law prohibiting the sale of patents for inventions or nullifying the laws of Congress regulating their transfer, it has the power, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud."

Approved in Ozan Lumber Co. vs. Union County Bank, 207 U. S. 251.

> McLean vs. Denver & Rio Grande R. R. Co., 203 U. S. 38;

Involved an inspection law of the territory of New Mexico, which inspection law prohibited the shipment from the State of hides which had not been inspected pursuant to its terms. It was objected that this interfered with interstate commerce and levied a direct tax upon that commerce as it specifically applied to out of state shipments. The Court, however, sustained it as an inspection law, as being within the police power of the State, and not in conflict with the Commerce Clause of the Federal Constitution. It might be interesting to know that one of the reasons assigned by the Court was that it was designed to prevent thieves from shipping hides of cattle stolen by them out of the State. We do not apprehend that a majority or any considerable number of the citizens of

the then territory of New Mexico were cattle thieves, but an inconvenience was necessitated upon the majority and the vast majority of the citizenship of New Mexico in order that cattle thieves might be more readily apprehended and punished. And yet it is said in assailing the Act in question that the State is powerless to prevent the sale of millions of dollars' worth of worthless stock because complainants are put to some inconvenience in the plying of their trade. We quote what was said in the *McLean* case, commencing at page 54:

> "It is urged that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the Territory. It is true that inspection laws ordinarily have for their object the improvement of quality and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the *Patapsco case, supra,* it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in *Neilson vs. Garza, supra,* decided on the circuit. We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the Territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the

> people of the Territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong."

We do not apprehend that the character of the article involved is important if it is such an article as inspection is proper before it is placed upon the market (and the question of propriety of such inspection must be largely left to the State) then the State may in the exercise of its police power provide for such inspection irrespective of whether the article is shipped in in interstate commerce or not. This is the rule and must of necessity be the rule, otherwise impure food stuffs would be immune from inspection because shipped into the State from a sister State, and the State's hands would be tied in the regulation of the sale of any commodity no matter how dangerous to the public health, convenience or welfare, simply because the article had crossed the border line of the State. Such a conclusion we respectfully submit is not supported by any of the authorities and is in conflict with the rights of the State.

C.

Congress has not legislated upon this subject. Assuming, but not conceding, that securities are articles of commerce and the regulation of their sale within the power of Congress, is the State powerless to prevent fraud in their sale pending congressional action? We respectfully submit that

The Minnesota Rate Case, 230 U. S. 352,

answers this contention. We quote from the syllabus:

"There remains to the States the exercise of the power appropriate to their territorial jurisdiction in making suitable provision for local needs. The State may provide local improvements, create and regulate local facilities, and adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved.

Where matters falling within the State power, as above described, are also by reason of their relation to interstate commerce within the reach of the Federal power, Congress must be the judge of the necessity of Federal action; until Congress does act, the States may act.

The paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own."

See also

Compagnie Francaise vs. Board of Health, 186 U. S. 380.

Further citation of authorities seems unnecessary to establish this well recognized rule. To re-state our proposition upon the question of interstate commerce we insist:

First, That securities, the sale of which in the State of Michigan are regulated by the Act in question, are not articles of commerce;

Second, The commerce clause of the Constitution does not inhibit legislation to prevent fraud legislation within the police power of the State because of the fact that the articles

offered within the State were brought from some other State;

And, third, That Congress not having spoken upon the subject and the legislation being conducive to the welfare and prosperity of the people of the State and within its police power is valid.

VII.

Some point was attempted to be made by one of the intervenors that the Court should say notwithstanding the Legislature had in form repealed Act number 143 of the Public Acts of 1913, that the Court could say that the Legislature had not repealed this Act but had amended it by the Act in question. We do not understand just what system of reasoning counsel relies upon to give the Court authority to so construe the Act in question, but if it is a question for the Court as to whether the former Act was repealed by the present Act, then it is a question for the State Court and its determination should control. The State Court has said that Act 46 of the Public Acts of 1915 repealed Act 143 of the Public Acts of 1913, in the case of

Howe vs. Doyle, 154 N. W. R. 62.

VIII.

It should be said in a general way that at the present time, not only the men of large means, but also the men of smaller means, including the laborer are in a thrifty condition so far as prices of the commodities they sell, their wages and their profits are concerned. A great many companies during the present European war have made fabulous profits. The success of Bethlehem steel, General Motors and many so-called war stocks is made the basis of the exploitation of numerous fraudulent companies. As we have indicated before, gold mines and

oil wells that existed only in imagination are not the only vehicle for fraud. A considerable percentage of the articles of incorporation filed in the office of the Secretary of State of the State of Michigan at the present time are related to the automobile industry, this state producing over one-half of the entire output of the country. A large number of the corporations organized in the State are either automobile manufacturing companies or companies producing some of the accessories. If these companies are honestly organized they will make substantial profits. The success of the automobile industry in Michigan is pointed to by every fraudulent promoter who seeks to sell stocks in an automobile or accessory company to the laboring men at Detroit who are engaged in this trade. He sees the success of the company in which he is employed and is quite prone to believe the smooth tongued promoter who may have nothing but a blue print of his car, an option on a piece of real estate or a prospectus. Michigan is also a great copper producing state, its copper mines having paid millions to its stockholders. The high price of copper makes good talking points for the promoter of a copper mine located in Arizona, Alaska or at some distant point. Why should the promoter of a fraudulent scheme be permitted to sell his stock in a fraudulent enterprise, pocket his profit, leaving only a prosecution for common law or statutory fraud as the only solace to the men who put their money into his enterprise? That the State may legislate to prevent fraud cannot be questioned, the method and the means of preventing that fraud being for the Legislature; if in the wisdom of the Legislature the fraud can be prevented by investigation before sale, why should the hand of the state be stayed, and why should it be said that its police power only permits it to punish after sale? Why should the legislature not prevent the fraud rather than punish after being perpetuated? We respectfully submit that if in the judgment of the Legislature the method here devised will prevent the fraud before its perpetration, that it is within the

province of the State to so legislate. That such fraud does exist in the sale of stocks, and that fraudulent schemes would be foisted upon the public but for this law is clearly demonstrated by the records of the Michigan Securities Commission which are public records, and which show that over five million dollars of issues submitted to that Commission had been found to be fraudulent and their sale has been prevented in this State.

We have spoken of the industrial conditions of the State of Michigan. Undoubtedly, the fraudulent exploitations of stocks in other states of the union equal that of Michigan. At least the legislatures of twenty-two states of the union have in their judgments found that such evil existed and had devised as the remedy laws of substantially the same character as the Michigan Act. These states, together with a reference to the laws, are as follows: Arizona. Chapter 9, Sections 2259 to 2271 Inc. Gen'l Laws. Arkansas. 1915 P. A. (Not in Law library.) California. Chapter 251, Sec. 2235 indexed "Investment Companies." General Laws. Florida. Chapter 6322 (No. 2) Laws of Florida, 1913. Georgia. Chapter 2, Art. 9, Sec. 10 No. 2899. Chapter 2, Art. 9, Sec. 10 (a) No. 2909. Idaho. Chapter 117 (S. B. No. 5) Session Laws 1913. Iowa. Chapter 13b—Sec. 1920 T. Supp. to Code of Iowa 1913. Repealed and amended in 1915 by Sec. 1920 u and subsequent sections in Supplemental Supp. Kansas. Chapter 164, Laws of Kansas, 1915. Louisiana. Sections 6485 to 6490, same being Act 40 of 1912 laws. Indexed under "Registration of stock and bond sellers." Maine. Chapter 209, Laws of Maine 1913. Missouri. C. S. S. B's 78 and 79, Laws of Missouri 1913. Montana. Chapter 85, laws 1913, P. 1051 Revised Code 1915. References are to pages in Miscellaneous laws. Nebraska. Art 21, Chapter 14, Secs. 248 to 263 inc. Revised Statutes 1913. No. Dakota. Chapter 91, S. B. 203, page 115 Laws of No. Dakota, 1915. Ohio. H. B. 46 (P. 110 laws of 1914) to amend Secs. 6373 and subsequent Secs. of Gen'l Code of Ohio. I find no amendment in

1915. Oregon. Chapter 341 of laws of 1913. So Carolina. I find no laws indexed. So. Dakota. Chapter 275 Session Laws of 1915, page 657. Texas. Chapter 32 (H. B. No. 9) laws of Texas 1913, P. 66. Vermont. Act No. 170 P. A. 1912, page 196. West Virginia. Chapter 18 laws of 1915, page 202. Wisconsin. Chapter 85, Secs. 1753-58, page 1356 Wis. Statutes 1915.

The passing of acts similar in purport, in fact some although identical with the Michigan statute is indicative of the Legislative judgment that there is an evil growing out of the sale of stocks, bonds and other securities and that such evil should so far as possible be prevented by enacting legislation which prohibits the sale of all stocks, bonds and securities (except such as are exempt and do not need investigation) until their fraudulent character shall be investigated by a commission created by the State. While it is true that this fact is not controlling upon the court, it is evidential in the highest degree that such evil does exist. An examination of the reports of the court of last resort of the State of Michigan shows that no action of the present commission and no action of the commission created under the act of 1913 has ever been reviewed in the court of last resort, although the Commission passes upon securities aggregating two to three million dollars per month. No honest industry in the State of Michigan has suffered by reason of this law. Fraudulent issues have been driven from the State. The money that would have gone into fraudulent enterprises has been invested in corporations honestly created and honestly conducted. The general prosperity of the State has been served by this particular litigation. We respectfully submit that the act in question contains none of the invalidities urged against it, that the order of the court below should be reversed and the injunction dissolved.

Respectfully submitted,

GRANT FELLOWS,

Attorney General,

Attorney for Appellants.

AMICUS CURIAE BRIEF

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

Nos. 413, 438, 439, 440, 860.

FRANK W. MERRICK, JOHN W. HAARER and GRANT FELLOWS, *Appellants,*

vs.

N. W. HALSEY & CO., ET AL., and THE WEIS FIBRE CONTAINER CORPORATION, *Appellees.*

and two other cases.

BRIEF, AMICUS CURIAE, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL INVOLVING THE CONSTITUTIONALITY OF THE BLUE SKY LAWS OF OHIO, MICHIGAN AND SOUTH DAKOTA.

Appeals from the District Court of the United States for the Districts of Ohio, Michigan and South Dakota.

GEORGE COSSON,
Attorney General of Iowa,

WALTER C. OWEN,
Attorney General of Wisconsin.

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Attorney General of Wisconsin.

STATEMENT.

The National Association of Attorneys General of the United States held its regular annual convention at Chicago just preceding the American Bar Association in August, 1916. Inasmuch as nearly one-half of the states of the Union have already passed blue sky laws, and considering that in every state in the Union, legislation in some form is under consideration, the systematic and far-reaching attacks made by the investment companies on the blue sky laws of the several states received the serious consideration of the convention, and it was the consensus of opinion that notwithstanding able arguments would be presented by the attorneys general of Ohio, Michigan and South Dakota, a brief, *amicus curiae*, should be filed on behalf of the National Association. Accordingly a committee was named to prepare such brief in this court, and the following men were designated: George Cosson, Attorney General of Iowa, and Walter C. Owen, Attorney General of Wisconsin.

The writer of this argument has read the briefs filed by Edward C. Turner, Attorney General of Ohio, Grant Fellows, Attorney General of Michigan, and Clarence C. Caldwell, Attorney General of South Dakota, and wish to state that the briefs are not only persuasive and comprehensive, but as we believe, conclusive of the propositions involved.

The court will not therefore, be burdened with a mere repetition of these arguments. In view, however, of the fact that Iowa, and the other states in the Union which

have passed blue sky legislation, are just as vitally concerned as Ohio, Michigan and South Dakota from whence come these appeals, we feel justified in asking the indulgence of this court, to the consideration of two or three propositions which will herein be presented on behalf of the National Association of Attorneys General.

HISTORY OF BLUE SKY LEGISLATION.

Speaking generally, the evil in connection with the sale of stocks and bonds has gradually been increasing for the past twenty years. Commencing with beautifully engraved certificates representing stock that was about to pay fabulous dividends upon mythical gold mines in California and Alaska, literary silver mines in Colorado and visionary oil wells in Texas and Oklahoma, the evil spread until corporations were being formed in almost every state in the Union for the express purpose of issuing worthless stock to be sold to a large class of people through out the United States who by thrift or inheritance had a small sum of cash, but whose knowledge of business, made them an easy victim for men who were skilled in the art of deception.

It was not then merely the evils of so-called visionary oil wells, gold mines and copper mines that had to be combated, but the sale of worthless stocks and bonds in innumerable domestic corporations which had been organized for the express purpose of defrauding the public and which were well calculated to deceive even capable business men by reason of the connection of prominent men in the state or community who for one con-

sideration or another had permitted the use of their names in connection with the promotion of such corporations.

The corporation laws of almost every state in the Union are such as to facilitate the organization of corporations for the purpose of defrauding the public, Iowa and one or two other states excepted.

The Peterson law of Iowa in substance provides that on the organization of a corporation in Iowa, the stock must be paid for in full in cash, or if property is exchanged for stock or patent rights or good will, the value of such property or good will must be valued by the executive council of our state. Only one or two other states however, have laws of this nature. The result was that the evil grew until almost a universal demand was voiced in every state in the Union looking to the correction of the evil.

Quite naturally the sun-flower state, Kansas, led off in the reform by passing a blue sky law. It is not surprising that this original bill was rather carelessly drawn. Its draftsman had a clear idea of the evil to be corrected, but a rather hazy conception of our fundamental law and especially the decisions of this court. The evil being great in almost every state in the Union, there was a corresponding demand for remedial legislation and hence blue sky laws were put upon the statute books of many states in the Union within a year or two after the Kansas act was passed, and in almost the identical language of the original Kansas statute. This Kansas type of legislation provided for the inspection and supervision of

investment companies and stock brokers, but it went farther than that. Without pointing out in detail the vice of this type of legislation, suffice it to say that the fundamental defect of the entire Kansas type of blue sky legislation consisted in this: that the originators of the bill were not content in drafting a bill that would protect the people of Kansas against fraud, but they went farther and sought to protect the people against *unwise* investments, even though no fraud was involved in the transaction. It was because of this feature that the courts were bound to strike it down as not in harmony with the fundamental law. Either this must be done or it must be recognized that the state under its police power had authority to appoint a guardian not only to advise but to prohibit the people from making unwise investments. The Kansas type of blue sky legislation required the commission to refuse a permit unless in the judgment of the commission the stocks and bonds would earn *a fair profit* on the investment. If the commission finds that the "sale will in all probability result in loss to the purchaser" the sale is prohibited.

The original Michigan act not only contained this provision but went farther and prohibited the sale in any event for a period of thirty days.

It was these two evils in the law that vitiated the statutes, and such was the holding of the federal courts.

In the case of Alabama Trans. Co. vs. Doyle et al, 210 Fed. 173, the court was very careful to point out on page 180 that: "The element of fraud is wholly eliminated

from this part of the statute." And on page 182, the court said: "Such a theory of the police power furnishes no support for thinking that the regular and normal course of dealings in one great branch of business may be suspended for thirty days." On page 184, the court says: "Hence it is clear that the dominant purpose is not to license and supervise individuals * * * * but to regulate, to the point of prohibition, the business itself." And on page 186, the court again emphasizes the point when they say: "Certainly the difference between a *fraudulent enterprise* and an *unprofitable* one is vital. The criterion of 'probable loss' is broader and more inclusive than the criterion of 'fraud.'" And the court's attitude of mind and open hostility to the point of irony is disclosed in a paragraph on page 181, in which the court indulges in this sarcasm: "It may be assumed that the officials who constitute the commission are more experienced and wiser than two citizens who desire to buy and sell property, with which they are familiar, at the price they have agreed upon; it may be assumed that these officials can foresee the coming events which will bring loss or profit on a proposed investment; but it has never yet been supposed by any court or any text-writer that it was within the police power of a state to decide for its citizens the financial advisability of their investments, *so long as the investors were not misled or deceived.*"

At the threshhold of the opinion, the court calls attention to the purpose of the act: "To stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations" and says:

"If just this intent had been carried into effect by the act as passed, *these cases would not be here.*"

This guardianship clause found in the Kansas type of legislation was eliminated from even the original Iowa law and when the matter first came before Judge McPherson the law was held constitutional in a letter addressed to the attorney general. Later, however, upon a re-hearing before three judges, the remaining judges were able to discover some other defect which they thought furnished an excuse for striking down the legislation.

As a result of the litigation that followed the passage of the early statutes, the attorneys general of the United States appointed a committee consisting of the Attorney General of Michigan, Grant Fellows, the Attorney General of Arkansas, W. L. Moose and the Attorney General of Iowa, George Cosson, to prepare a draft of a bill which would harmonize with the fundamental law and with the decisions of the federal courts, and this regardless of the fact that some state courts and one federal court had held this type of legislation valid.

The writer of this argument had in mind in the drafting of a new bill, the statement made by this court, in the case of Plumley vs. Massachusetts, 155 U. S. 462, and quoted with approval in Crossman vs. Lurman, 192 U. S. 189, and Patapsco Guano Co. vs. North Carolina, 171 U. S. 345, 361, as follows: "The constitution of the United States does not secure to any one the privilege of defrauding the public."

Accordingly it was the aim to eliminate all guardianship features and require so much inspection and supervision only as was necessary to prevent fraud.

It is of the utmost importance that this court keep in mind the difference between the modern type of legislation and the original type or the Kansas type of blue sky legislation. The original type undertook to establish such guardianship and paternalism to the end that no purchaser could be permitted even with his eyes open, and in the absence of fraud, to purchase any stocks, bonds or other securities which would not result in a fair profit. The latter type of legislation, and it is this type that is now under consideration, undertook not to supply individual citizens with business judgment, but to prevent fraud in the sale of stocks, bonds and other securities.

The title to the Iowa act, which is the key to the Iowa statute and the legislation under consideration in this court, is as follows:

"A bill for an act to repeal the law as it appears in chapter 13-B, Title IX, supplement to the code, 1913, and to enact a substitute therefor, to prevent fraud in the sale and disposition of stocks, bonds and other securities within this state, by requiring an inspection of such stocks, bonds and other securities, and an inspection of the business of such persons, firms, associations, companies or corporations, including their agents and representatives, and the payment of an inspection fee."

Section 6 of the Iowa act, which is fairly typical of the modern legislation now under consideration, more specifically designated as section 1920-u6, Supplemental Supplement to the Iowa Code, 1915, provides that:

"It shall be the duty of the secretary of state to examine the statements and documents so filed in his office and secure such further information as he deems necessary, if any, and if from such examination of all papers and documents submitted to him and from such other information as he may obtain, he finds that the sale within this state of stocks, bonds or other securities by any such person, firm, company, association or corporation *would work a fraud upon the purchasers thereof,* then and in that event he shall refuse to grant such permit; otherwise he shall grant such permit."

In other words, the modern type of legislation is bottomed upon one thought and one thought only and that is to prevent fraud in the sale of stocks, bonds and other securities and therefore, only so much inspection is required as is necessary to accomplish this end, and the fee required is an inspection fee commensurate with the cost of inspecting the papers and administering the act. The vice of the decisions of the lower federal courts consists in this: they first hold the original Kansas type of legislation invalid because it undertakes to prohibit a man from making an investment, even though absolutely free from fraud unless the commissioner thinks it would result in a wise investment. In this opinion it is clearly recognized that a statute which sought only to prevent fraud would be valid and that "if just this intent had been carried into effect by the act as passed these cases would not be here."

Alabama & N. O. Transp. Co. vs. Doyle, 210 Fed. 175.

But when a bill is prepared to accomplish this purpose, and this purpose only, eliminating the guardianship fea-

ture, the same three judges proceed to say in the case of N. W. Halsey & Co. v. Merrick, 228 Fed. 805 at 806 that they find no substantial change in the modern type of legislation and the original Kansas type of legislation. They say "some minor details have been corrected, but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power."

It is amazing that any three federal judges of the United States could be found who were familiar with the decisions of this court who would attach their names to an opinion in which it is said that there is no difference between a statute designed solely for the purpose of preventing fraud and a statute designed for the purpose of preventing a man from making an unwise investment even though the transaction was honest in every detail.

Considerable time has been spent in elucidation on this point but no apology is offered for the reason that it goes to the very heart and substance of the basis of the court's decision.

No argument will be made on the proposition that the statutes delegate legislative and judicial powers to the commission for the reason that in view of the decision of this court in the case of United States vs. Grimand, 220 U. S. 506, we do not regard the question in the realm of legitimate debate. The same is true of one or two other minor questions presented.

This brings us face to face with one or two fundamental propositions.

ARGUMENT.

I.

THE ACT IN QUESTION DOES NOT DEPRIVE PERSONS OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

It was most earnestly insisted by counsel for the investment companies in the contest in the lower court involving the constitutionality of the Iowa law that the business in question was of a private nature not affected with a public interest, and therefore, not within the purview of the police power of the state.

It was strenuously argued that the court might regulate public service corporations and transportation companies, saloons, hotels, public elevators and matters of that nature, but not a private business, and strange as it may seem in view of the numberless decisions of this court, the lower court in the case of Alabama & N. O. Transportation Co. vs. Doyle, 210 Fed. 179, adopted the same view. Under the heading: "*Are plaintiffs deprived of their property or liberty without due process of law?*" the court on page 179 said:

"This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers, and the like. The issuing of commercial paper, stocks, or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more

(Italics and blackface ours.)

'affected by a public interest' than is the business of buying and selling groceries." etc.

But the police power of the state cannot thus be set in a straight jacket; it cannot thus be limited; it cannot thus be confined to saloons and elevators, transportation companies and matters of that nature.

This court said in the case of Plumley vs. Massachusetts, 155 U. S. 462, at 479:

"The constitution of the United States does not secure to any one the privilege of defrauding the public."

And this was quoted with approval in the case of Crossman vs. Lurman, 192 U. S. 189, 198, and by Chief Justice Fuller in the Patapsco Guano Co. vs. North Carolina, 171, U. S. 345, 361.

Perhaps no better definition can be given of the scope of the police power than the philosophical pronouncement by John Stuart Mill wherein he said:

"As soon as any part of a person's conduct affects prejudicially the interest of others, society has jurisdiction over it." Essay on Liberty, Chapter 4, page 283, Harvard Classics.

The statement is not quoted merely because it was said by a man eminent as a political economist and sociologist, but because a more accurate expression of the substance of the decisions of this court could not be found.

As was said by our own supreme court in the case of McGuire vs. C., B. & Q., 131 Iowa, 340, 353:

"The police power cannot be embalmed in any fixed or rigid formula," and this Iowa decision was approved by this court in the case of C. B. & Q. vs. McGuire, 219 U. S., 549.

It was said by this court in the case of Noble State Bank vs. Haskell, 219 U. S., 104, 111, that:

"It may be said in a general way that the police power extends to all the great public needs" and to the same effect see Camfield vs. United States, 167 U. S. 518, 524, in which it was said:

"The police power is not subject to any definite limitations but is co-extensive with the necessities of the case and the safeguard of the public interests" and is in harmony with the holding in the case of Holden vs. Hardy, 169, U. S., 366, wherein this court quoted with approval from Chief Justice Shaw to the effect that "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community," but that "all property was held subject to those general regulations which are necessary to the common good and general welfare."

And in the Drainage Ditch case, 200 U. S., 561, 592, wherein the court said:

"We cannot assent to the view expressed by counsel. We hold that the police power of the state embraces regulations designed to promote the public convenience *or the general prosperity* as well as regulations designed to promote the public health, the public morals or the public safety."

In the case of Bacon vs. Walker, 204 U. S., 311, 317, the Supreme Court of the United States in sustaining the validity of a statute of Idaho prohibiting the grazing of sheep within two miles of the dwelling house of the owner of a possessory claim, in reply to the original argument of counsel that the extent of the police power did not cover an occupation of this nature, after citing numerous cases, said:

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends ...e limits. It is enough to say that they have fallen i... error exposed in Chicago, Burlington & Quincy R... ...mpany vs. Drainage Commissioners, 200 U... ...2. In that case we rejected the view that ... ...er cannot be exercised for the general wel... ...ng of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not therefore enter into the discussion whether the sheep industry is legitimate and not offensive."

That the police power may be exercised for the sole purpose of protecting the people against fraud and imposition is best demonstrated in a concrete way by the decision of the Supreme Court of the United States in the case of Schmidinger vs. Chicago, 226 U. S., 578. This case makes it clear that no such limitations may be placed upon the police power as contended for by opposing counsel. This case makes it clear that the Supreme Court of the United States was not indulging in dictum when it

said that the police power extends to the public welfare or the prosperity of the community; and the case is further authority for the fact that the exercise of the police power is not limited to that class of business which exists at the mercy of the state, or which contains a potential nuisance, such as liquor saloons or billiard halls, nor is its exercise limited to that class of business which exists under the grant of the state such as railroads and public service corporations, nor to that class of business which is peculiarly clothed with public interests, such as hotel keepers, insurance companies and stock food companies. In this case the supreme court affirmed the decision of the Supreme Court of Illinois in the case of Chicago vs. Schmidinger, 245 Ill., 317. The case involved the constitutionality of an ordinance passed by the City of Chicago which required in part that every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago, shall weigh a pound, avoirdupois (except as hereinafter provided), and such loaf shall be considered to be the standard loaf in the City of Chicago. The bread may also be sold in half, three-quarters, double, treble, quadruple, quintuple or sextuple loaves, and in no other way; that each loaf must have affixed thereon in a conspicuous place a label at least one inch in diameter upon which is to be printed in plain type the weight of the loaf in pound or fraction thereof, and the business address of the maker, baker, or manufacturer; and also every baker, manufacturer or seller of bread in the City of Chicago shall keep scales in a conspicuous place in the baker's shop or store suitable for the weighing of bread and whenever re-

quested should weigh the bread in the buyer's presence; and provides a fine for a violation thereof.

It was urged that the statute offended against the Fourteenth Amendment for the reason that there was a large demand for loaves of bread of a different size than specified in the ordinance, and for the reason that temperature and climatic conditions as well as moisture affected the weight of the bread; that it especially offended against those persons who were doing a legitimate business where no fraud was attempted; that it sought to regulate a private, useful, legitimate business, and hence offended against the due process clause of the federal constitution.

The court, however, quoted from Gundling vs. Chicago, 177 U. S. 183, 188, to the effect that "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, *are questions for the state to determine*, and their determination comes within the proper exercise of the police power by the state," and that unless the regulations were wholly arbitrary, unreasonable and extravagant, they were not subject to federal interference.

And the court on page 588, said:

"Laws and ordinances of the character of the one here under consideration and tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power."

It was urged that there were special circumstances which rendered the ordinance in question invalid, for the reason that in order to make a loaf which under various conditions would weigh a full pound at the time it was sold would necessitate the use of twenty ounces of dough, and for the further reason that there was a large demand for loaves of bread of a different size. To all of these objections, however, the court said: "But inconveniences of this kind do not vitiate the exercise of legislative power. *The local legislature is presumed to know what will be of the most benefit to the whole body of citizens*" and that "this court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the *general welfare.*"

The ordinance had but one purpose in mind, to-wit: the protection of the pocketbook of each individual who happened to buy bread in the City of Chicago. It related entirely to the question of fraud. *The element of wholesomeness, nutritive value or sanitation was not even remotely involved.* This is clearly recognized by the court because they say that the exercise of the police power in fixing weights and measures and standard sizes must necessarily limit the freedom of contract, but "so long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due

process of law, freedom of contract is not interfered with in a constitutional sense" and the court directed attention to the case of C., B. & Q. vs. McGuire, 219 U. S. 549, where the cases of the court were reviewed referring to the limitation of the right to contract as supporting the doctrine therein announced, although the McGuire case which sustained the statute of Iowa limiting the right of contract had not the remotest relation to food products.

Another bread case which had to do only with protecting the people against fraud is People vs. Wagner, 86 Mich. 594. The law there under consideration fixed an arbitrary standard for the size of loaves of bread and it was clearly recognized by the court that the basis for the ordinance was to protect the people against fraud and dishonesty and that it had no relation to the preservation of life, health or good order. The court said:

"The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. *Laws providing for the detection and prevention of imposition and fraud as a general proposition are free from constitutional objection.*" Citing Tied. Lim., Sec. 89, page 208.

Laws and ordinances respecting honest weights and measures, and laws requiring that commodities of certain character shall be weighed upon public scales have so long been accepted to be within the proper exercise of the police power for the purpose of protecting the people against fraud, that courts have long since ceased to take the trouble to cite cases in support of the validity of such laws and ordinances.

The supreme court of Indiana recognized that the legislature under the police power had the right to regulate a lawful business for the sole purpose of protecting the people against fraud and imposition in the case of Brechbill vs. Randall, 102 Ind. 528. This case involved the constitutionality of a statute requiring persons who sell or offer for sale patent rights, to file with the clerk of the proper county a duly authenticated copy of the letters patent and an affidavit that the letters are genuine and have not been revoked or annulled, and that the person in question had authority to sell the rights under the patent in question. The court said: "The statute simply prescribes a method by which our citizens can secure protection against fraud" and held that the requirements in question did not impede the free course of commerce and was not unreasonable.

The supreme court of the United States has twice held the acts of state legislatures valid prohibiting the sale of stocks of goods in bulk upon the ground that such statutes tended to prevent fraud upon innocent creditors, although it was recognized that occasionally a merchant may lose the opportunity of a legitimate sale who had no intention whatever to deceive or defraud.

In the case of Lemieux vs. Young, 211 U. S. 489, the court had under consideration the statute of Connecticut. This act prevented the sale of stocks of goods in bulk unless seven days previous detailed notice was recorded in the office of the town clerk, and further provided that a sale without complying with the act was void as against creditors.

In discussing the act, the supreme court of Connecticut, (79 Conn. 434) said: "It is of course possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such notice, but 'a possible application to extreme cases' is not the test of reasonableness of public rules and regulations. Com. vs. Plaisted, 148 Mass. 375. The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. Chicago, etc., R. R. Co. vs. State, 47 Neb. 549, 564."

Mr. Justice White, who wrote the opinion, quoted the above with approval and then added: "That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police power of the state, we think it too clear to require discussion," and then called attention to the number of states which had legislated upon the subject and said:

"As the subject to which the statute relates was clearly within the police power of the state, the statute cannot be held to be repugnant to the due process clause of the fourteenth amendment, *because of the nature or character of the regulations which the statute embodies,* unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. Booth vs. Illinois, 184 U. S. 425. This, we think, is clearly not the case."

The second bulk sales case is that of Kidd, Dater Co. vs. Musselman Grocer Company, 217 U. S. 461, which

involved the constitutionality of the Michigan law. The Michigan law is more comprehensive than the Connecticut law. The Michigan law required notice, either personally or by registered mail, to the creditors and a detailed inventory and other matters. Mr. Justice White, who again wrote the opinion, quoted with approval from the former case to the effect that "as the subject to which the statute relates is clearly within the police power, the statute cannot be held to be repugnant to the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies." That these statements of the Chief Justice, to the effect that if a general subject matter is included within the police power of the state, the details of the legislation, even though unwise, are not for the judiciary to consider, were not made carelessly or inadvisedly further appears from the case of Waters-Pierce Oil Company vs. Deselms 212 U. S. 159. This case involved the constitutionality of the statute of Oklahoma prohibiting the sale within the state of oil unless of a specific gravity as specified in the statute. Testimony being offered to show that from some localities oils which are perfectly safe are obtained, although they have a specific gravity somewhat above the standard fixed in the statute, it was therefore insisted that the law in question was not a legitimate exercise of the police power since oils were excluded which would be as safe as oils within the standard fixed by the act. To this Mr. Justice White, speaking for the court, said:

"We think the court below was clearly right in deciding that *as the subject was within the police power*

of the state, it was not within the province of the judiciary to disregard the statute and treat it as void even upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescribed."

That the legislature has the same right to protect the people against the fraudulent sale of corporate bonds and stocks, as well as the fraudulent sale of food products, patent rights, and other matters, and that the general subject-matter embodied in our blue sky law now under consideration is subject to the regulation under the police power of the state, is conclusively determined by the supreme court of the United States in the case of Brodnax vs. Missouri, 219 U. S. 285. In this case there was involved the constitutionality of the statutes of Missouri which made it unlawful for any person, firm or corporation to keep in the state of Missouri any office, store or place **for the buying or selling of shares of stock or bonds of any corporation,** or petroleum, cotton, grain or other provisions or commodities, either on margin or otherwise, where the same is not at the time actually paid for and delivered without at the time of the sale, the seller shall cause to be made a complete record of the thing sold, the purchaser, the time of delivery in a book kept for that purpose; and also required the seller to deliver to the purchaser a written or printed memorandum on which he should place a stamp of the value of twenty-five cents, which should be purchased of the state auditor, and made it unlawful for the person to receive the memorandum without the stamp, and subjected the person who violated said statute upon conviction to a fine of not

less than fifty nor more than one thousand dollars. It was urged that the statute offended against the federal constitution in the same respects in which it is now claimed that the blue sky statutes offend against the federal constitution. It was urged that the statute abridged the privileges and immunities of citizens of the United States, deprived defendants of property without due process of law, denied the equal protection of the laws contrary to the Fourteenth Amendment and offended against the commerce clause. To these objections, the supreme court said:

"The words of the statute show that the keeping of a place where **corporate stocks and bonds**, as well as grains, provisions and other commodities were bought and sold, but not paid for at the time, without a complete record of the transaction (including a minute of the time of delivery) in a book kept for that purpose, and without the purchaser receiving a printed or writ- and without the purchaser receiving a printed or written memorandum of the sale, **needed to be regulated, so as to protect the public against unfair or fraudulent practices** that might result to the injury or inconvenience of the general public. We are not prepared to hold that the state in this matter has exceeded the bounds of reason, or has legislated beyond the necessities of the case, or has arbitrarily interfered with the court of ordinary business among its people. While it is the duty of the federal courts, if their jurisdiction be lawfully invoked, to see to it that the constitutional rights of the citizen are not infringed by the state, or by its authorized agents, they should not strike down an enactment or regulation adopted by the state under its police power, unless it be clear that the declaration of public policy contained in the statute is plainly in violation of the federal con-

stitution. Much may be done by a state under its police power which many may regard as an unwise exertion of governmental authority. But the federal courts have no power to overthrow such local legislation, simply because they do not approve it or because they deem it unwise or inexpedient."

Referring specifically to the arbitrary interference with a lawful business and the liberty to contract, the court said:

"Much was said at bar about the liberty of contract. In a large sense every person has that liberty. It is secured by the provision in the federal constitution forbidding the state to deprive any person of liberty or property without due process of law, **but the federal constitution does not confer a liberty to disregard regulations as to the conduct of business which the state lawfully establishes for all wihin its jurisdiction.**"

Another case to protect the people against fraud and imposition is found in the same volume, House vs. Mayes, 219 U. S. 270. This also involved the consfitutionality of a statute of Missouri. The statute provided that every sale of grain, seed, hay or coal should be made on the basis of actual weight without any deduction regardless of any claim or right by reason of any custom or rule of the board of trade and provided penalties for a violation thereof. It was strongly urged that the statute offended against the Fourteenth Amendment; interfered with a lawful business and the right to contract, and that the rules in question were reasonable because they allowed only for loss through dirt and foreign matter; that the statute in question would greatly interfere with the general business of that nature. It was said that the

board of trade of Kansas City is a voluntary association of individuals who perform great services to the public and that its purpose is to enforce as between its members a high standard of business dealing. To this the supreme court of the United States said:

"Let all this be granted, and yet it must be held that the board, in the management of its affairs has such close and constant relations to the general public, that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the state necessary or needful to protect the people against unfair practices that may likely occur from time to time. Such regulations do not, in any true sense, interfere with that 'liberty of contract' which the individual members of the Board of Trade are undoubtedly entitled, under the constitution to enjoy, without unnecessary interference from government; for, the liberty of contract which that instrument protects against invasion by the state is subject to such regulations of the character just stated, as the state may establish for the protection of the public and the promotion of the general welfare. If such state regulations are not unreasonable, that is not simply arbitrary nor beyond the necessities of the case, they are not forbidden by the constitution of the United States. We so adjudge on both principle and authority."

And again referring to the discussion of the scope of the police power the court on page 282, said:

"It is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the **common good.**"

Another case in the same volume which involves a number of the essential elements found in the case at bar is that of Engel vs. O'Malley, 219 U. S. 128.

The facts in the case as stated by the court are as follows:

"This is a bill in equity to prevent the carrying out of Chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another or for any other purpose without a license from the comptroller. The requirements for obtaining the license, so far as they affect the plaintiff, are that the applicant shall deposit ten thousand dollars, to be fixed by the Comptroller, conditioned upon the faithful performance of the duties undertaken. After notice shall have been posted for two weeks the Comptroller may approve or disapprove the application in his discretion, and licenses are to pay a fee of fifty dollars. Sec. 25. The license **is revocable** at all times **by the comptroller** for cause shown. Sec. 26. Carrying on the business specified, or using the word 'banking' or 'banker' on signs, letter heads or advertisements in connection with any business, without a license, is made a misdemeanor. Sec. 27. The foregoing provisons do not apply to any corporation or 'individual banker' authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe-keeping from a guest; to any express or telegraph company receiving money for transmission; to individuals or partnerships where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than five hundred dollars during the fiscal year preceding an

affidavit to that effect; or, finally, to any individual or partnership filing a bond approved by the Comptroller for one hundred thousand dollars when the business is in a city having a million inhabitants, or, if elsewhere, for fifty thousand dollars; or money, or securities that the Comptroller approves. Sec. 29d."

Plaintiff contended that he was a citizen of the United States; had been engaged in business twenty years; that by honesty and industry he had built up a business of value; that the terms of the act were so stringent that he would be unable to comply with them, but would be forced out of business, and that therefore the act offended against the Fourteenth Amendment and the commerce clause of the federal constitution; that it denied due process and discriminated. It was urged that the character of the business was not within the police power and hence the statute offended against the Fourteenth Amendment. The court stated the matter as follows:

"This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the Fourteenth Amendment, the state could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force. It is said that even if the plaintiff could furnish the money and bond required, **the comptroller might refuse a license upon his arbitrary whim.** No guides are given in section 25 for the discretion that he is to exercise, and a provision in section 29e that nothing in the article shall be construed to require the Comptroller to make any inquiry as to the solvency of any applicant is thought to exclude solvency as a test and to leave the matter at sea. We do not so understand the purpose and pur-

port of section 29-e, and should suppose that the discretion to be exercised in the refusal to grant the license under section 25 was similar to that exercised under section 26 revoking one; **and that in each case the comptroller was expected to act for cause.** But the nature and extent of the remedy, if any, for a breach of duty on his part we think it unnecessary to consider; for the power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached. See Gundling vs. Chicago, 177 U. S. 183. Lieberman vs. Van de Carr, 199 U. S. 552."

The case of Engel vs. O'Malley is determininative of the propositions involved in this controversy. The case is authority for these fundamental propositions: The legislature may regulate a lawful business under its police power if evil practices grow up in connection with that business which make it necessary or advisable to legislate against in order to protect the people against fraud and imposition. It is authority for the proposition that as a condition precedent to the carrying on of a business the state may require the procuring of a license if reasonably necessary to protect the people against fraud. It is authority for the proposition that an administrative officer may be delegated with the primary duty of determining who shall receive a license. It is authority for the proposition that under these circumstances a license or inspection fee may be exacted and that a bond which may reach the amount of fifty thousand dollars, together with a deposit of ten thousand dollars, may be required in order to protect the

public against fraud and imposition. It is authority for the proposition that the statute is not invalid because individual bankers and others are exempted from the provisions of the act.

Any one of several of these decisions from this court, especially the cases of Engel vs. O'Malley, 219 U. S. 128; Schmidinger vs. Chicago, 226 U. S. 578; Brodnax vs. Missouri, 219 U. S. 285; C., B. & Q. vs. McGuire, 219 U. S. 549; Bacon vs. Walker, 204 U. S. 311; Noble State Bank vs. Haskell, 219 U. S. 104, is conclusive of the proposition that the business in question comes within the purview of the police power of the state.

The statutes then being clearly within the police power of the state, the only remaining question worthy of serious consideration is whether or not they operate as a *direct* burden upon interstate commerce.

II.

THE STATUTES DO NOT OFFEND AGAINST THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The attorney general of Ohio has made a most persuasive argument, commencing on page 89 of his brief, showing that the sale of stocks and bonds within the state independent of the transportation is not and cannot be interstate commerce, but is wholly intrastate commerce and therefore governed by the decisions of Nathan vs. Louisiana and Paul vs. Virginia, and later cases in harmony therewith, and not the Lottery cases, or the so-called Text book or Pigg case.

We do not care to further elaborate on this proposition. The argument is most persuasive, and we believe, conclusive.

The writer of this argument however is a thoroughgoing nationalist and believes that no provision in the federal constitution has had more to do in making this a great nation and creating national sentiments and ideals than the commerce clause of the federal constitution. We believe in the freedom of commerce and industry, whether state or interstate, and would refuse to present any proposition if we believed it to be a direct burden upon commerce whether intra or interstate.

Our contention is that whatever inconvenience may be suffered by stock brokers and investment companies, is both incidental and trifling compared with the great good to be accomplished by the act in question; that whether the commerce is state or interstate is immaterial for the reason that the act in question is clearly an inspection law designed for the express and exclusive purpose of preventing fraud, and that while commerce may be slightly affected, it is not directly burdened.

The framers of our fundamental law in paragraph 2 of section 10 of the constitution expressly recognized the validity of inspection laws by the state with a reasonable fee for executing and administering such laws. Necessarily our theory of inspection laws has changed and developed to keep pace with the growth and complexity of our commerce, state, interstate and national.

In the case of Neilson vs. Garza, 2 Woods, 287, Mr. Justice Bradley speaking for the court said:

"No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets."

But he also added: "The scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported and to those intended for domestic use as well."

To the same effect see Clintsman vs. Northrup, 8 Cowan, 46, but it was also said in the case of Clintsman vs. Northrup that one of the objects of inspection so far as it applied to domestic sales was **to protect the community from fraud and imposition.**

Justice Blachford, in the case of Turner vs. Maryland, 107 U. S. 38, said that recognized elements of inspection included quality of the article, form, capacity, dimensions, weight of package, the mode of putting up, marking and branding of various kinds, but that it was not necessary for all these elements to co-exist in order to make a valid inspection law; that quality alone may be the subject of inspection without other requirements, **or inspection may be made to extend to other matters;** that because an inspection law did not include the element of quality, the court could not, therefore, say as a necessary legal conclusion that the law had ceased to be an inspection law.

And the extent to which inspection laws may be passed under the police power is further elaborated in the case of McLean vs. Denver, 203 U. S. 38. The court said:

"The law under consideration, designed to prevent the clandestine removal of property in which a large number of people of the territory are interested, seems to us an obviously rightful exercise of this power. * * * * It is further urged that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the territory. It is true that inspection laws ordinarily have for their object the improvement of quality and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the Patapsco case, supra, it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in Neilson vs. Garza, supra, decided on the circuit. **We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power,** when the legislation intends to subserve the purpose in view. In the territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. **The exercise of the police power may and should have reference to the peculiar situation and needs of the community.**"

The case of Patapsco Guano Co. vs. North Carolina, 171 U. S. 345, 351, made it certain that inspection laws applied to importations and not merely exportations. The court said:

"Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on

importations as well as exportations; and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce."

It was, however, in that case definitely settled that inspection laws may operate as well on importations as exportations and that the same principle which is exercised by the states pursuant to section 10 of article 1 of the constitution with reference to inspection of foreign commerce, *may be exercised by the states under the police power of the states with reference to inspection of interstate commerce;* and it is therein definitely recognized that the inspection laws passed pursuant to the police powers, do not act on the subject before it becomes an article of commerce when the articles transported are interstate commerce and not foreign commerce.

On page 357, the court said:

"Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, **and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called police power.** No doubt can be entertained of this where the inspection is manifestly intended and calculated in good faith, to protect the public health, the public morals or the public safety. **And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally.** * * * Where the subject

is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope."

This case, Patapsco Guano Company vs. North Carolina, supra, and the previous cases referred to make it certain that inspection laws may be passed under the police power to protect the people against fraud and imposition, and when so passed, if they bear a relation to the object to be accomplished and operate upon commerce between the states, they have the same validity as inspection laws passed by the states pursuant to section 10 of article 1 of the constitution with reference to inspection of foreign commerce. In this case, Patapsco Guano Company vs. North Carolina, it was strongly urged that it was not an inspection law "because it was not limited to articles produced in the state **and because it did not relate to the health, morals or safety of the community.**"

In the case of McLean vs. Denver & Rio Grande, 203 U. S. 38, it was especially urged that the statute of New Mexico offended against the commerce clause for the reason that the statute which was passed wholly for the purpose of protecting the people against fraud, required the payment of a fee and the act did not apply to local commerce held for the period of thirty days, but only to interstate commerce or commerce shipped beyond the ter-

ritory. In discussing this exact proposition, Mr. Justice Day, speaking for the court, said:

"It is argued that this act lays a special burden upon interstate commerce, because under the law hides not offered for transportation are not required to be inspected after thirty days in slaughter houses and not at all outside of slaughter houses. **But legislation is not void because it meets the exigencies of a particular situation.**"

And that: "Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic."

The court further pointed out that commerce going beyond the territory was beyond local control as an additional reason for the discrimination against interstate commerce. The court added:

"The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the territory are interested, seems to us an obviously rightful exercise of this power. **It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong..**"

To the same effect see the case of Savage vs. Jones, 225 U. S. 501; Standard Stock Food Company vs. Wright, 225 U. S. 540.

On this branch of the argument a most instructive case is that of New York vs. Hest., 211 U. S. 31. This involved the constitutionality of a statute of New York which prohibited the killing of game or the having in possession of game of a certain character during certain period of the year, commonly referred to as the "Closed season." It was shown that the relator had imported from Russia a number of the grouse family known as the blackcock, and had imported from England one golden plover; that the birds in question were lawfully taken in England and Europe during the open season in those countries. It was admitted that they were of a different variety from those raised in the state of New York; that they could therefore be readily distinguished and this was true even when cooked and ready for the table. It was further admitted that they were imported by the relator in accordance with the provisons of the tariff laws and the regulations in force during the open season for grouse and plover in New York; that the birds were sound, wholesome and valuable articles of food, and recognized as articles of commerce in different countries of Europe and the United States. In addition to this, the court further conceded that possibly because of the different variety that the law was unnecessarily stringent; that an inspection law might be all that is required. The court, however, found that since the law was passed in the exercise of the police power, the terms and conditions were primarily for the legislature to determine, and since the legislature had held that in order to protect local game during the closed season it was expedient to make possession of all game during that time, whether taken within or without the state, a misdemean-

or, it was not for the court to say that such legislative act was an abuse of the police power, and therefore offended against the federal constitution; in other words, the court held that commerce in a recognized wholesome food product could be prohibited because of the fact that the legislature of the state of New York thought this to be expedient in order to protect the local game of the state of New York, admitted to be of a different variety—and hence the mere possession of a legitimate article of commerce imported from a foreign state was sufficient to subject the person offending to criminal punishment.

It was especially urged that the statute in question offended against the commerce clause. It was, however, held that it neither deprived the plaintiff of his property without due process, nor was the statute an unlawful regulation of foreign commerce. On this point at page 40, the court said:

"That a state may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, *it has also been held in repeated instances that laws passed by the states in the exercise of their police power, not in conflict with the laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws,*" etc. Citing cases.

In the case of Engel vs. O'Malley, previously referred to, the same objection was raised to the New York statute that it offended against the commerce clause. As above stated, the statute of New York required a license to engage in the business of receiving money on de-

posit or for transmission; authorized the comptroller to pass upon certain questions and required the filing of a bond. It was held, however, that the act was not subject to this objection. The court in discussing the question said:

"The question is whether the state law creates a direct burden upon what it is for congress to control, and the facts of the specific case must be weighed. * * * We are of the opinion that the commerce clause of the constitution is not infringed."

In the case of Brodnax vs. Missouri, 219 U. S. 285, previously referred to, it was shown that the statute of Missouri made it unlawful for any corporation, association, co-partnership, or person to keep or cause to be kept in the state any office, store or other place **wherein is permitted the buying or selling the shares of stocks or bonds** of any corporation or petroleum, cotton, grain, provisions or other commodities, etc., without making a complete record and delivering to the purchaser a memorandum of sale and the placing of a stamp thereon to the value of twenty-five cents to be purchased of the state auditor. It was held that the act was not in violation of the commerce clause of the federal constitution.

In the case of Hatch vs. Reardon, 204 U. S. 152, a statute of the state of New York requiring a stamp of the value of two cents to be placed upon the transfer of every share of stock within the state of New York was held not to offend against the commerce clause because it affected property without the state, or because

one or both of the parties previously came from other states. On the ultimate question which the court thought not necessarily involved, there were cited the cases of Nathan vs. Louisiana, 8 How. 73; Woodruff vs. Parham, 8 Wall. 123; Brown vs. Houston, 114 U. S. 622; Emert vs. Missouri, 156 U. S. 296.

The result of all these cases simply demonstrates under different facts and different circumstances what was said by this court in the case of Plumley vs. Massachusetts: *"That the constitution of the United States does not secure to any one the privilege of defrauding the public,"* and that any act passed for the purpose of protecting the people against fraud and deception, if reasonable in its operation and free from arbitrary restraints, falls within the purview of the police power of the state.

The case of People vs. Compagnie Generale Transatlantique, 107 U. S. 59, cited by the lower federal court in passing upon the constitutionality of the original Iowa blue sky law in the case entitled Compton, et al. vs. Allen, et al., 216 Federal 537, 548, in which it was therein held that a statute of New York imposing a tax upon every alien passenger arriving at the port of New York from a foreign country should be liable for a tax, is beside the point. Of course, it amounted to a regulation and direct burden upon foreign commerce and it could not be held as an inspection law because, as the court there clearly pointed out, clause 2 of section 10 of Article I of the Constitution of the United States relating to inspection laws had exclusive reference to property.

It seems idle to point out the error of the lower federal court by suggesting that, because a state law providing for inspection of passengers is invalid, therefore, a state law providing for the inspection of property is likewise invalid and that, because we reject the science of the phrenologist, we must, therefore, reject the work of the state officer to inquire into the solvency of an investment company and its method of doing business.

An inspection of butter, or meat, or milk, or any food product may not be subjected to an absolute test. There is no yard stick to measure the degree or the extent to which decomposition in a food product may have extended, and butter may be good, excellent, fair or bad. There is, nor can be, no absolute standard of inspection unless it is dealing with matters subject to mathematical tests, such as size and weight, and yet no one would contend that inspection laws relating to food products for man and beast do not come clearly within the provisions of clause 2 of section 10 of Article I of the constitution, and the decisions heretofore cited showing that inspection laws relating to interstate commerce may be passed subject to the police power of the state assuming that they affect commerce incidentally and do not operate as a direct burden. We contend, therefore, that the statutes in question are clearly inspection laws but, whether inspection laws or not, if passed under the police powers of the states and free from arbitrary restraints and if reasonably adapted to the end in view, they do not deprive plaintiff of property without due process of law nor offend against the commerce clause of the federal constitution.

In this connection we wish to suggest to this court a matter which has not yet received proper consideration by the lower federal courts, or in the arguments: that the contention of appellees that the statutes in question are unconstitutional, in its last analysis amounts to this: that here is a great evil existing in every state of the Union *and that no power exists either in the state or federal government to correct the same.* We are to console ourselves with the comforting thought that the person who is defrauded may, if he have the means and persistency, put the criminal machinery in motion which might result in having an occasional offender fed in a cage like a wild beast or subjected to a fine, but it is well known that in the operation of the criminal law the number of persons who actually suffer punishment compared with those who offend is trifling and insignificant. Assuming, however, and admitting that punishment would follow, it is not entirely satisfactory to the person who has invested the accumulations of a lifetime in some fraudulent enterprise relying upon the representations of some agent or investment broker.

As was well said by Judge Trieber in passing upon the constitutionality of the blue sky law of Arkansas, *Standard Home Company v. Davis, State Bank Commissioner, et al.*, 217 Fed., 904 at 919:

"Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer. Statutes enacted for such purposes ought not to be declared invalid by the courts upon slight grounds even if extreme cases can be imagined where they may work an injustice."

And the court in his admirable opinion further said:

"Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. Such regulations are proper and wholesome. The dockets of the national courts have been crowded for the last few years with criminal prosecutions of persons charged with the use of the mails of the United States in carrying out fraudulent schemes by so-called investment companies and persons offering allurements to get rich quick. *But those courts are only clothed with jurisdiction to prosecute those who in carrying out their fraudulent schemes, make use of the mails, and then only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes, and can in no wise act as a preventative. The states alone can provide for the prevention and punishment of all who commit frauds. Although the mails are not used for their accomplishment, and enact laws to prevent the commission of these crimes.*" (Page 919.)

In the very nature of things it would be well nigh impossible for the federal government to create the administrative machinery for inspection laws of all commerce between the states assuming (which we do not admit) that the sale of stocks and bonds within a state exclusive of the transportation is interstate commerce.

The whole question then resolves itself into this: The states either have or have not the sovereign power to protect their citizens against fraud and deception in the

sale of stocks, bonds and other securities. If the states have this power, **it can only be exercised by some form of supervision and control. It can only be exercised by some form of administrative law. All states now have criminal laws prohibiting the obtaining of property under false pretenses and fixing the punishment by a term of imprisonment in the penitentiary, but these criminal laws have failed to accomplish the purpose. It is a mere pretense to assume that any adequate or substantial relief may be had through criminal channels. Some form of inspection and supervision, some form of administrative law alone will suffice to accomplish the purpose.**

The genius of the age is preventive. We are much concerned in the method of treating smallpox, typhoid, diphtheria and numberless contagious and infectious diseases, *but we are intensely more concerned in preventive medicine, sanitary hygiene, wholesome conditions, the elimination of slums, sanitary drainage and sewage,— in short in every preventive measure which makes it impossible for epidemics to prevail.*

This court has recognized this fundamental principle. It was the relation between health and long hours of employment in mines and at hazardous occupations which furnished the basis of the decisions holding valid statutes limiting the hours of employment which concededly are a limitation upon the freedom of contract. So, likewise, we are interested in prison reform, but we are more concerned in the public schools, the vocational schools, playgrounds, Y. M. C. A.'s, wholesome amusements, settlement houses, the nature of home conditions

and all the innumerable agencies and elements which prevent boys and girls from becoming criminals than we are in reforming criminals.

The whole spirit and genius of the age is preventive and corrective rather than penal and reformatory. Hence, we find as a necessary corollary or consequence this spirit of the age expressing itself in social laws and social customs. Hence, we have as a result, workmen's compensation acts, employer's liability acts, safety appliance acts, child labor laws, pure food laws (state and national), laws limiting the hours of labor for women, limiting the hours of labor in hazardous occupations and more general laws limiting the hours of labor of employes, and identical in that spirit and purpose is to be found the question of inspection laws looking to the protection of the people of the several states from fraud and deception.

Surely this court cannot say that the only power the states have to protect its citizens against fraud and imposition in the sale of stocks, bond and other securities is the punishment of an occasional offender under the criminal laws of the state.

The decisions of the lower federal courts should be reversed.

Respectfully submitted,

GEORGE COSSON, *Att'y Gen'l of Iowa.*
WALTER C. OWEN, *Att'y Gen'l of Wisconsin.*

Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANK W. MERRICK, JOHN W. HAARER and GRANT FELLOWS, Appellants, *against* N. W. HALSEY & Co. *et al.*, and THE WEIS FIBRE CONTAINER CORPORATION, Appellees.	No. 413.

BRIEF IN REPLY TO BRIEF OF ATTORNEYS-GENERAL ASSOCIATION.

1. The representatives of the Attorneys-General Association have the advantage of arguing the constitutionality not of any particular statute, but of an assumed or hypothetical statute.

It is a cheering thing after three years' endeavor to find one of the Attorneys-General who has litigated in defense of the so-called Kansas type of act and now admits that this type is unconstitutional, even though his study of the Kansas Act has been so hurried that he makes the statement (page 7) that the Kansas type of law required the Commission to refuse a permit, unless it found that the securities would earn "a fair profit." The words quoted should be "a fair return."

The Attorneys-General now concede that "to appoint a guardian not only to advise, but to prohibit the people from making unwise investments," is fundamentally unsound, and that the proper scope of blue-sky legislation should undertake "not to supply individual citizens with business judgment, but to prevent fraud in the sale of stocks, bonds and other securities."

As a matter of fact, the 1915 report of the so-called Attorneys-General Committee, signed by Mr. Cosson, in presenting the Act adopted in Michigan and South Dakota, did not admit that the Kansas type of act was unconstitutional and did not purport to completely meet the decisions which had held this type of act unconstitutional. It stated that the objections sustained by these decisions had been *"largely* obviated." It undoubtedly reflected the viewpoint not of the Attorney-General of Iowa, but of the Attorney-General of Michigan, who had previously stated that, in his opinion, the original Michigan decision was unsound and that the new legislation should be based on the original Michigan statute. The present Michigan Act is plainly based on this view and is very different from the act pictured by the Attorney-General of Iowa. This report and act are, we believe, found in the printed proceedings of the Attorneys-General Association for 1915. We refer to the proceedings of the 1914, 1915 and 1916 conventions of this Association to refute the suggestion that there has been at any time any extended discussion of the basic principles of "blue-sky" legislation. We have always felt confident that in such a discussion the proposal of executive control would be condemned—if the matter were fully presented. It is characteristic of the governmental viewpoint

of the few Attorneys-General active on this matter, that they do not see the need or justice of giving an opportunity to be heard to the legitimate business interests vitally affected by their proposals.

It is unfortunate that the Attorneys-General of Iowa and Wisconsin have not been able to give more careful study to the statutes now before the Court. The Attorney-General of Wisconsin should have his attention called to the fact that the Ohio, South Dakota and Michigan Acts still require a discretionary license for dealers. This license has been eliminated from the Wisconsin Act and is somewhat different under the Iowa Act. The Ohio Act requires the disapproval of a proposed flotation if, among other things, it is found that the securities are to be sold "on grossly unfair terms."

The hypothetical act to which the present Attorneys-General's brief is directed seems to contain substantially but one section taken from the present Iowa Act. Just how the Attorneys-General hope to sustain the Michigan, South Dakota and Ohio acts, whose purpose is to protect the ignorant and gullible inhabitants of those states from the sale by fly-by-night dealers of oil and mining stocks, by an argument directed to a single section of a different act drafted by Mr. Cosson, with the apparent purpose of protecting the "capable business men" of Iowa from "corporations * * * formed * * * for the express purpose of issuing worthless stock" and "for the express purpose of defrauding the public," passes our comprehension (page 5).

Despite the effort to make it so appear this hypothetical statute does not meet the objections sustained in the original Michigan statute. It ap-

plies, as did the 1913 Michigan Act to all concerns issuing or selling securities, and is not confined to the ear-marked class described by Mr. Fellows and adverted to in the Michigan opinion. The Attorney-General of Iowa is quite insistent that both intelligent and unintelligent investors need the protection afforded by official infallibility.

2. We accept the challenge, however, and assume for the purpose of this reply brief that the acts in issue on this appeal may be held to have this single purpose of preventing fraud in the sale of securities by *prohibiting said sale except under a permit of a state official or commission, to be issued only after an investigation at the expense of the applicant and in the event that the official or commission does not find that the proposed sale "would work a fraud upon the purchasers thereof."*

This reduces the proposition to its simplest terms.

Are we to understand from Mr. Cosson that under this assumed act the right to sell can only be denied when the Commission are able to prove that the proposed offering would work a fraud?

Not a single one of all these Attorneys-General would, we are sure, make a statement in open court or in their briefs that they construe the laws to be limited as stated; that is, that unless provable fraud is found, the permit must issue; and yet, if we are to accept their somewhat inconsistent statements as to the purpose of this legislation, that it is intended to reach evils so marked and atrocious as that of the fly-by-night dealer in oil and mining stocks, in stocks "about to pay fabulous dividends on mythical gold mines in California and Alaska, literary silver mines in Colorado, and

visionary oil wells in Texas and Oklahoma, * * * corporations formed * * * for the express purpose of issuing worthless stock * * *, the sale of worthless stock and bonds in domestic * * * corporations which had been organized for the express purpose of defrauding the public" (p. 5); if, as stated, these are the evils to be corrected, certainly it would seem, that upon investigation, their fraud could be discovered and proved.

If the permit can only be refused when provable fraud is present, then how weak and puerile is the act in meeting this "great public need." A man who attempts to defraud is simply told not to do it in the particular way for which he has asked a permit, leaving him free to devise a new way that will not be so clear or so provable; free also to seek other fields in Ohio or Kansas where the state officials may not be superior to "capable business men." How much better it would be in such a case to follow the course of the Virginia Fraud Act or Bank Supervisors Bill and put the man who attempts the proposed fraud in jail, where he belongs.

If this is not the purpose or proper construction of the Act—if it is intended that the Commission, though not able to prove fraud, shall sense it, so to speak, a far off, and because they sense it, because "in their opinion" the sale will work fraud, is the dealer to be denied the right to sell his own property or securities in the ordinary markets and in the normal way? Is the company to be denied the right to borrow money and issue bonds in the normal way?

It is to be noted that in the so-called "Inspection Acts" relied upon by the Attorney-General, the thing prohibited is detectable and demonstra-

ble by inspection. (Only in the cases applying to food products and resting primarily on the duty to protect the public health, is there any room permitted even for expert judgment.) But here we are told the frauds to be detected are "well calculated to deceive even capable business men" (p. 5). If the Commission is unwilling in a doubtful case to give the applicant the benefit of the doubt, if "in their opinion" the sale would "work a fraud," but if this can only be determined by the sixth sense, so to speak, and may not be demonstrated or proved, if in fact, as may conceivably happen, the Commission are mistaken, then what shall we say of the individual whose right to sell his property in the normal markets and in the normal way is destroyed because the Commission in their caution so decree?

But if under the law the Commission cannot refuse a permit where the fraud is only sensed, however strongly it may be sensed, though they are morally sure that it is a fraud but is not provable, then the Commission is under the painful necessity—in fact, it is compelled by the terms of the Iowa Act as quoted and by the terms of the Michigan and South Dakota Act, *if it cannot find the fraud*—to give to the applicant a state permit. Here, indeed, we have that very thing which the Attorney-General of Iowa, quoting from *Plumley v. Massachusetts*, 155 U. S., 462, justly and accurately characterizes as "a *privilege* to defraud the public."

On one construction, the proposed hypothetical statute absolutely and completely destroys the right of an individual dealer or of a partnership or company to sell its property or borrow money upon its bonds, or secured notes, although no wrong has been or can be proved against it. The

fundamental right of an individual is made subject to an executive prohibition based on suspicion and opinion.

On the other construction, the Act wholly fails of its professed purpose and itself "works a fraud" and a very great and serious fraud upon the very class of investors it purports to protect.

Taking the first construction, the one that the states undoubtedly claim, it seems plain that for all practical purposes, we are back to the original Kansas law. Its character and its effects have been fully covered in our original brief. We emphasize again the potentially and actually prohibitive effect upon what is, in fact, one of the greatest heritages of the human race—the power of invention and of enterprise. The asset of the human brain and the asset of human character and human judgment must be totally absent from any appraisal of value or of prospects upon which the Commission's judgment must in all cases be based.

3. This new brief, as those of the appellants on these appeals, is replete with dicta entirely disassociated from the facts to which they relate. We instance particularly the quotation from *Gundling* v. *Chicago* (p. 18), to the effect that—"What such regulations shall be and to what particular trade or occupation they shall apply, are questions for the state to determine." It is only necessary to point to *Lieberman v. Van de Carr* and to the *German Alliance Insurance Company* case to convince even the Attorneys-General that this dictum cannot be taken in the literal sense in which they try to take it, entirely dissociated from the facts. What the Court had in mind is more fully expressed in *Lieberman v. Van de Carr*, when it said (p. 563):

> "It is primarily for the State to select the kinds of business which shall be the subjects of regulation, and, *if the business affected is one which may be properly the subject of such legislation*, it is no valid objection that similar regulations are not imposed on other businesses of a different kind."

Practically the whole reliance of the Attorneys-General brief is on the cases which we have, we think, properly classified in our original brief, particularly under the heading of "Approach and Contact of Authorities." The Attorneys-General entirely ignore the fundamental question as to the right of executive control. The cases which they cite are but repeated instances of legislative restrictions and safeguards similar to those sought to be imposed by the so-called Bank Supervisors' proposed act.

The statement on page 31 that

> "Any one of several of these decisions from this Court * * * is conclusive of the proposition that the business in question comes within the purview of the police power of the state,"

is somewhat startling, as not a single one of the cases cited deals with the normal business of selling securities. This is the *sine qua non* of the whole case which the Attorneys-General practically ignore.

The Attorneys General entirely fail to distinguish between "legislation in the exercise of the police power, which regulates the manner of the use or disposition of property" (Spurr v. Travis, 145 Mich., 721, 724, quoted in our original brief, page 28) and the more distinctive and limited field within which an administrative board or officer

may be given discretionary control over a quasi-public business or over particular public matters or transactions. The former class of legislation is accurately defined in Railroad Co. *v.* Husen, 95 U. S., 465, 471, in which the Court said:

> "According to the maxim *sic utere tuo ut alienum non laedas*, which, being of universal application, it must, of course, be within the range of legislative action *to define the mode and manner* in which everyone may so use his own as not to injure others."

The foregoing was quoted by the Court from Thorp *v.* Railroad Co., 27 Vt., 149, and was later cited and quoted with approval by Mr. Justice Harlan in Plumley *v.* Massachussetts, 155 U. S., 461, 478.

If in the Bulk-Sales cases, the Acts had entirely prohibited such sales and then provided for an executive permit, unless upon investigation it was found that the sale would work a fraud, we would have an approach to the present statutes; but with this important difference, that a partial prohibition of the character supposed applying to an exceptional sort of transaction might (?) conceivably be upheld under Otis *v.* Parker, whereas in these cases we have a total prohibition of the normal transactions of a normal business, subject to the executive permit.

4. There is no question but that some of the Inspection Acts reach to the prevention of fraud, as a necessary element in protecting the good quality of the goods for export or for import. The fundamental and essential point as to them all is that the quality is capable of determination by physical inspection or by chemical analysis. It is in no case a matter of opinion based upon the tak-

ing of testimony requiring a trip to South America or Arizona to inspect the outside of a vein of ore.

In the case of foods and products endangering public health or safety, the character of which may be determined by experts, the determination is undoubtedly justified under the police power as applying to the fundamental public needs.

The effort to uphold these laws as "inspection acts" can hardly be taken seriously. These acts all fall within a distinctive class under Section 10 of Article I of the Federal Constitution, and within the principles set forth in *Gibbons* v. *Ogden* (1 Wheat., 9, 203)), the *Turner* case (107 U. S., 38), and the Patapsco Guano Company case (171 U. S., 345).

Although the prevention of fraud was emphasized in the latter case, the act was still an inspection act, and its purpose was a public purpose within the principle of such acts, to protect and improve the productive capacity of the soil of the state and the character of the products of the soil. The prevention of fraud in matters quasi-public in their effects is not the same as the prevention of fraud in individual transactions. Considered, however, as a fraud act, the act in the case cited prescribed specific safeguards against fraud and no question was raised or decided as to executive control. It fell within the special class of inspection acts and the general class of legislation prescribing reasonable and not prohibitive safeguards.

GEORGE W. WICKERSHAM,
ROBERT R. REED,
Counsel for Appellees Named.

CHARLES K. ALLEN,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, No. 413.

FRANK W. MERRICK, JOHN W. HAARER and GRANT FELLOWS,
Appellants,

against

N. W. HALSEY & COMPANY *et al.*, and the WEIS FIBRE CONTAINER CORPORATION,
Appellees.

BRIEF FOR APPELLEES OTHER THAN THE WEIS FIBRE CONTAINER CORPORATION ET AL.

Statement.

The statement by the appellants should be supplemented as follows:

The intervenors Remick, Hodges & Company, a partnership, have no place of business in Michigan and are not sending any agents into the state, but are endeavoring to secure business in said State, and sell securities therein as a part of their general business carried on in the City of New York, by agents and by mail throughout the United States: The volume of their business in Michigan and the value thereof is not sufficient to enable them or

justify them in attempting to comply with the act, and the act if enforced against them would have the effect of preventing them from making any offerings in said State, from establishing any business therein, and from selling securities therein. The act entirely prevents them from developing and extending their business in the State of Michigan (Supplemental Record, pp. 3 and 4).

The Attorney General is in error in the statement made on page 73 of his brief that there is no allegation that the "intervenors do not maintain offices and places of business within the State."

The objections to the act upon which these appellees rely are

First: That it violates the XIVth Amendment of the Federal Constitution.

Second: That it violates Section 8 of Article I of the Federal Constitution by imposing a burden upon Interstate Commerce.

The Michigan Act.

The statute of Michigan which is the basis of the complaint in this suit, was approved by the Governor April 9th, 1915, Act No. 46 (Rec. pp. 63-75).

Section 1 creates a Commission.

Section 2 designates every person, incorporated or unincorporated, who by himslf, itself or others, sells or negotiates for the sale of stocks, bonds or other securities, issued by him or them within the State of Michigan, as an *"investment company."* If a resident of, or organized in, the State of Michigan, as a *domestic* investment company; otherwise, as a *foreign* investment company.

Section 3 exempts from the provisions of the act eight classes of securities, one of which is "securi-

ties which are listed in any standard manual of information approved by said Commission," but the Commission is empowered by special order to suspend the sale of any such listed securities upon its finding that the sale would work a fraud.

Section 10 designates as a *"dealer,"*

> "any person, firm, copartnership, corporation or association whether domestic or foreign, not the issuer, who shall in this State sell or offer for sale any of the stocks, bonds or other securities issued by any foreign or domestic investment company, except the securities specially exempted in this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities,"

and forbids a dealer to sell or offer for sale any such securities, or profess the business of selling or offering for sale such securities, unless and until he shall have filed a list of the same with the Commission. It excludes from the definition "an owner not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature."

By Section 11, any "dealer" desiring to sell or offer for sale within the State of Michigan any stocks, bonds or other securities not exempted under the terms of the act, must first register with the Michigan Securities Commission, and furnish in such form as it may require, upon oath, the following information: The dealer's name, residence and business address, the general character of the securities to be dealt in, the place or places where the business is to be conducted within this State,

and where the business in this State is not to be conducted by the dealer in person, then the names and addresses of all persons in charge thereof. He must pay a fee of $50, and furnish the Commission with such other information in addition to that above specified as the Commission shall deem necessary in order to thoroughly acquaint it with the character of the dealer's business. All authorized agents of any dealer must be registered with the Commission. No agent shall act as such until so registered. If the dealer be a non-resident of Michigan or a foreign corporation, he shall at the time he registers file with the Commission a written duly authenticated appointment of the Commissioner of the State Banking Department of Michigan as his or its agent in Michigan upon whom process or pleadings may be served for and on behalf of the dealer, "which appointment shall be irrevocable." Upon compliance with these provisions, the Commission must issue to the dealer a license which "shall be good until revoked by said Commission for good cause upon notice to the dealer and a hearing duly had."

Section 14 makes it unlawful for any "investment company" or dealer or representative thereof, directly or indirectly, to sell, cause to be sold, offered for sale, take subscriptions for, or negotiate for sale, in any manner in the State of Michigan, any stocks, bonds or other securities not exempted in the act, unless and *until the Commission has approved* thereof and issued its certificate in accordance with the act. "Nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statements and papers required to be filed by virtue

of the provisions of the act or the rules of the Commission." Makes it unlawful for any such company, dealer or agent, to issue, circulate or deliver any advertisement, circular, prospectus, or other document in regard to its stocks, bonds or other securities in the state differing in any way from the copy filed with the Commission. Makes it unlawful for any newspaper published in the State of Michigan to advertise the sale of any stocks, bonds or securities which have not been approved by the Commission or exempted under the provisions of the act.

By Section 15, no "dealer" shall sell, or offer for sale, within the State of Michigan any of the stocks, bonds or other securities of any "investment company" until such company shall have fully complied with the provisions of the act, nor until the "dealer" shall have been registered with the Commission under the terms of the act. Then follows a somewhat ambiguous proviso, reading as follows:

> "Provided, however, that should any dealer desire to sell, or offer for sale, within this State the stocks, bonds or other securities of an investment company which has not itself complied with the provisions of this act, said dealer shall make application to said Commission for license as hereinbefore provided for applications by investment companies, and shall pay the same fee required to be paid by said investment company."

Section 4 provides that before selling, offering for sale, taking subscriptions for, or negotiating for sale in the State of Michigan, any stocks, bonds or other securities of its own issue, every investment company, domestic or foreign, shall file in the office of the Commission a statement showing in full detail, (1) the plan upon which it proposes

to transact business; (2) a copy of all contracts, stocks, bonds or other instruments which it proposes to make with, or sell to, its contributors or customers; (3) a copy of its prospectus and of the proposed advertisement of its sale of stocks, bonds or other securities, showing (4) the name and location and main office of the investment company, the names and addresses of its officers, and an itemized account of its financial condition and the amount of its assets and liabilities, and such other information touching its condition and affairs as the Commission may require. If it be a partnership, it must file a copy of its articles of copartnership or association and all other papers pertaining to its organization; if a corporation, a copy of its articles of incorporation, constitution and by-laws and other papers; if it be organized under the laws of another State, a copy of the laws under which it exists or is incorporated, besides a copy of its charter, etc., and a certificate of the proper officer of such State showing that it is authorized to transact business there, and it must pay a filing fee of not less than $10 nor more than $100.

By Section 6, every foreign investment company before offering for sale any of its stocks, bonds or other securities in Michigan, must file "its irrevocable written consent that suits and actions may be commenced against it in the proper Court of any county in this State in which a cause of action may arise or in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of this State, on the Commissioner of the State Banking Department."

No formal requirement respecting application for the permission provided for in subsequent sec-

tions is contained in the act, but Section 7 assumes that the application is required, by enacting that "said application shall be heard by the said Commission at the next regular meeting after said application is filed (providing such filing shall precede such monthly meeting by twenty-four hours), or at a special or adjourned meeting of said Commission", at least two days' notice of which shall be given to the applicant.

Section 8, empowers the Commission to demand of any investment company seeking to come under the provisions of the act "any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the Commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company including the value of patents, good will, promotion and intangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said Commission may prescribe." It may withhold its license to sell stocks, etc., if such

corporation has issued the same for property, patents, good will, promotion and intangible assets "in excess of their value as found by said Commission or if said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such Commission until such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said Commission have been surrendered to such corporation and cancelled by it, and until the said stock has been deposited in escrow under the terms prescribed by said Commission."

By Section 9, it is made the duty of the Commission to examine the statements and reports filed with it, and to hear the applicant, and it is given the power to examine under oath any person interested in or connected with the investment company. "And if said Commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent or *are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said Commission work a fraud upon the purchaser,* then said Commission shall disapprove the sale of such proposed contracts, stocks, bonds or other securities and shall notify such investment company by registered mail of its findings and disapproval, and it shall be unlawful for such company to do any business in the way of selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever of any such contracts, stocks, bonds and other securities in this State; and said contracts, stocks, bonds and other securities shall not be sold in this State." But if the

Commission "shall not find" either of the conclusions last stated, "it shall approve the sale" and issue a certificate in the form prescribed, giving "permission" to sell the same within the State.

Section 13, attempts to regulate the manner in which the accounts of every "investment company," domestic or foreign, shall be kept, and requires their books of account to be open at all times during business hours to stockholders and investors in said company and to the Commission, or its duly authorized representatives, and provides that *all* such investment companies shall be subject to examination by the Commission, or any member thereof, or its clerks, accountants or examiners at any time the Commission shall deem it advisable in the same manner as is provided for the examination of State banks, and requires the investment company to pay a fee for each of such examinations of not to exceed $7.00, "for each day or fraction thereof that any member of said Commission, clerk, accountant or examiner is absent from the capitol building for the purposes of making such examination," and also to pay the actual travelling and hotel expenses of the person or persons making such examination, and it provides that the failure or refusal of any investment company to pay such fees on demand of "such Commission, clerk, accountant or examiner, while making such examination" shall work a forfeiture of the right of that company to sell or offer for sale any of its contracts, stocks, bonds or other securities in the State of Michigan; fixes the same fee for a preliminary examination, as aforesaid, and enacts that "in case it shall be made to appear to the Commission from the examination of said investment company after said investment company has been

authorized to sell its stocks, bonds and securities," that the further sale thereof would work a fraud upon the purchaser, the Commission may by order revoke the license of the investment company to sell its stocks, bonds and securities, upon notice duly given and a hearing duly had, and may, pending such hearing, suspend the right of such company so to sell.

By Section 16, all information obtained by the Commission with reference to any securities and all the records of the Commission are made open to examination by the public.

By Section 20, provision is to be made to furnish those who may apply therefor, with information regarding any investment company or its affairs on file with the Commission.

By Section 21, every investment company, domestic or foreign, is required during the month of January in every year to file with the Commission a detailed statement in such form and giving such information as the Commission shall require, showing its condition at the close of business the preceding December 31st.

By Section 22, the Supreme Court is given jurisdiction upon petition of any person aggrieved, to review by certiorari any final order of determination of the Commission, but the issuance of the writ is not, unless specifically ordered by the Court, to operate as a stay of proceedings.

By Section 23, any person who shall violate any of the provisions of the Act shall be deemed guilty of a misdemeanor, and on conviction fined not more than $1,000 or imprisoned in the county jail for not more than one year in the discretion of the Court.

Section 24 provides that if the courts of the State

should declare any section or provision of the Act unconstitutional or unauthorized or in conflict with any other section or provision of the Act, then such decision shall affect only such section or provision so declared to be unconstitutional or unauthorized, and shall not affect any other section or part of this Act.

The other provisions of the Act and other sections not quoted refer to matters of machinery, and are not essential to the consideration of the points upon which the constitutionality of the Act depends.

Briefly, this act makes the right of a foreign or domestic corporation, or any purchaser from it of its stock or bonds, or of any agent employed to sell its stock or bonds, in the State of Michigan, to depend upon:

(1) Its first obtaining permission or license of the Commission, to secure which it must pay the fees, and furnish the information specified in Section 4; and (if a foreign corporation) must file an irrevocable consent to be sued in any county in Michigan in which a cause of action may arise, or in which the plaintiff may reside;

(2) its subjecting itself to the investigations described in Section 8, and the indefinite expense of examination of its affairs in Section 13, under penalty of forfeiture of its rights to sell its stock or bonds in Michigan, if it do not pay such expenses on demand;

(3) its subjecting itself to the control of the Commission as described in Section 8, as to the amount of bonds, stocks or other securities it may issue, and the liability to have those already issued cancelled.

It subjects its right to directly or indirectly market its stock or bonds in Michigan to forfeiture, in case the Commission shall be of the *opinion* that the sale of such stock or bonds would work a fraud upon the purchaser.

It makes the right of any individual, or corporation, to carry on the business of dealing in stocks or bonds of corporations in the State of Michigan dependent upon securing a license from the Commission, to obtain which he must

> register and furnish the information, and pay the fees, prescribed in Section 11, and (if a non-resident or foreign corporation) irrevocably *appoint* the Commissioner of the State Banking Department of Michigan his or its agent upon whom process against him or it may be served.

Besides, in every case of the sale or offer for sale of securities for which a certificate or license has not been given to the issuing company, the dealer must

> make application as provided in the case of the issuing corporation, and can obtain the certificate only when the conditions specified, including investigation and appraisal if desired, under Section 8, have been met.

This latter requirement on the dealer is prohibitive in many cases, potentially prohibitive, at the will of the Commission, in all cases.

Discussion of the Act.

We desire on this appeal to urge only what seem to us to be the fundamental defects of the present act. The whole act rests on four propositions:

1. That the right to buy and sell securities as a business, or "in the course of continued or successive transactions of a similar nature" may be prohibited except under executive license subject to revocation.

2. That the right to sell securities in a given case may be prohibited except under executive license subject to revocation.

3. That no securities can be sold in the State which have been issued for property "in excess of (its) value" as found by the Commission.

4. That exemption from the act may be obtained by listing a security in a standard manual approved by the Commission.

1. The licensing of the business is the pronounced feature of the Ohio Act. The control over each transaction is the pronounced feature of the Michigan Act. Both features are present in each act.

The Michigan, 1915, Act, does not in terms make the original license discretionary. It does require a regulative license fee of $50, and the furnishing "said Commission with such other information as said Commission shall deem necessary" as to the character of the dealer's business. This fee and these burdens are a prerequisite to the right of any dealer to sell a single bond in the State. As to at least one of the intervenors, Remick, Hodges & Co. (Supplemental Rec., p. 3) they are prohibitive.

The irrevocable appointment of the Banking Commissioner as an agent for service of process is also required. No duty of giving notice of such

service to the defendant is by the statute devolved upon that official.

The license "shall be good until revoked by said Commission for good cause upon notice to such dealer and a hearing duly had" (Section 11).

There is no specification defining the "*good cause*" for which a license may be revoked. The power of revocation is complete based on the assumption that the business is subject to prohibition and may be made dependent upon the sufferance of the Commission.

No securities whatever can be offered or sold of the non-exempt class covered by the license "unless and until said Commission has approved thereof and issued its certificates in accordance with the provisions of this Act" (Section 14).

This is the sweeping and fundamental prohibition of the act. It applies without chance of evasion to every offering by any dealer within or without the State, and to every security, wherever issued, offered or attempted to be offered in the State, except only those exempted under Section 3.

The only "certificate in accordance with the Act" is that provided for under Section 9. It may be obtained by the issuing company in the first instance, but if not so obtained, the dealer must obtain it at his own burden and expense. There is no escape from this prohibition. The dealer "shall make application to said Commission for license as hereinbefore provided for applications by investment companies and shall pay the same fee required to be paid by said investment companies."

The application by an investment company is under Section 4. Transposing the language to fit the dealer and putting upon it the most liberal construction, the dealer is required to file:

1. "A statement showing in full detail the plan upon which" the investment company "proposes to" or does "transact business."

2. "A copy of all contracts, stocks, bonds, or other instruments which" the dealer proposes to sell to his customers, "together with a copy of (his) prospectus, and of the proposed advertisements of (his) sale of stocks, bonds or other securities."

3. Such statement "shall also show the name and location and main office of the investment company; the names and addresses of its officers, and an itemized account of its financial condition, and the amount of its assets and liabilities, and such other information touching its condition and affairs as the Commission may require," also "all papers pertaining to its organization," including charter, State laws, etc.

4. A filing fee equal to 1/10 per cent. of the face value of the securities offered not exceeding $100 nor less than $10.

5. All papers verified by an officer of the corporation.

6. An irrevocable consent to service by a foreign investment company.

This latter requirement might be held not to apply when application is made by the dealer, though it evidences a purpose to secure jurisdiction over the issuing company as a necessary condition precedent to permitting its securities to be sold in the State.

These provisions are in effect completely prohibitive of the normal sale by a dealer of the securities of any company which has not itself

complied with the act. We say "the normal sale," meaning the sale by a dealer of securities which he has purchased in the normal way and desires to sell in the normal way. If he is making a flotation of an original issue acquired from the company and desires to float a substantial part of them in Michigan, he could presumably in the first instance, in some cases, obtain the proofs required and get the Commission's certificate. But if he was simply the owner of the securities and desired for his own account to sell them in Michigan, it cannot be assumed that he could compel or induce the investment company to give him all the data required by the act, or which might be required by the Commission.

No provision is made for waiving these provisions. The scheme of the act is plain to prohibit the sale of the securities of any company which does not furnish all the information required or desired.

But the foregoing is not all. The "certificate of authority" may be withheld until the Commission "may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal "at the like expense of all its properties, tangible and intangible" (Section 8). If the dealer is applying, this expense and burden must fall upon him. If he does not feel able to pay it, he will not get the "certificate of authority" to sell his own property.

If upon the information filed and investigation made,

"The said Commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities"

a. "are fraudulent or"

b. "are of such a nature that the sale" thereof "would in the opinion of the Commission work a fraud upon the purchaser"

"then said Commission shall disapprove the sale * * * and shall notify" such company, and it shall be unlawful for such company "to offer or sell the securities in the State, and said securities "shall not be sold in this State."

"If, however, said Commission shall not find" the conclusions so stated above (a or b),

"then it shall approve the sale of such *stocks*" (*sic*) in Michigan "and issue its certificate" in terms stating that has been given permission to sell $ of the given security in the State, and adding in type two sizes larger than any other part of said certificate, the words:

"The Commission does not recommend the purchase of this security."

The duty to use this warning only arises when under the act the Commission "shall approve the sale," a point worth much as a selling argument, it not being necessary to call the investor's attention to the further fact that this duty to "approve such sale" is mandatory upon a negative condition, the failure or inability of the Commission to find, if it "shall not find," that the sale is fraudulent or would work a fraud (Section 9).

3. But even though there be no fraud or prospect of fraud in law or in effect, the certificate may still be withheld. Last, but not least, the Commission

"may fix the amount" of securities to be issued for property and require such securities to be "deposited in escrow under such terms" as it prescribes, and may "withhold its license to sell" securities if they have been issued for property "in excess of (its) value as found by said Commission * * * until such * * * securities issued * * * in excess of the value so found by said Commission have been surrendered to such corporation and cancelled by it" (Section 8).

We would like to find some reasonable workable construction of this section, because we desire to test the fundamental principle involved in it, that the State can, through its Commission and upon its finding prohibit the sale in the State of stocks or bonds of a corporation of another State if the Commission disagrees with the judgment of the corporate officers, acting under authority of the State creating the corporation, and possibly upon the specific finding of officials of the issuing State, as to the value, for instance, of a patent for which stock has been issued.

In the argument in the Court below on the Michigan 1913 Act, it was very frankly conceded by the Attorney General that had that act been in force and enforced when the Ford Automobile Company was financed, that company and its automobile in all likelihood would not now be in existence. Nor did he find it necessary to apologize for such a law, but justified it by naming other concerns which have since failed, which he said would also have been made impossible. In reply it was pointed out by counsel familiar with the other concerns named, that they in their inception were very promising ventures, not like the Ford enterprise, a mere speculative possibility based on the intangible asset of a human brain.

Countless enterprises, including the greatest modern inventions, could be cited which, like the Ford automobile, might never have seen the light of day, had the power to finance them been subject to the veto of a State Board given by these acts.

The present Section 8, in fact takes the place of "*the probability of loss*" feature of the original act. There must in the opinion of the Commission be full face value back of the securities before they can be sold in Michigan at any price.

4. But all these drastic prohibitions mean nothing. These plaintiffs and intervenors have nothing to which to object and nothing to fear. Michigan dealers, we are told, have no trouble with the act, and outside dealers need have no trouble. Under Section 3, "the provisions of this act shall not apply to—(h) *securities which are listed in any standard manual of information approved by said Commission.*" Under Section 10, a man does not become a dealer when he offers securities "specially exempted in this Act," and under Section 11 he is not required to obtain a license or pay a fee unless he desires to sell "securities not exempted under the terms of this Act."

If a "standard manual" means anything to this Court, that is, if it takes judicial notice of what a standard manual is, it must, of course, have the correct knowledge as to it. It will not indulge in any assumption contrary to the fact, that the manual furnishes any specific security against fraud. It will know that these manuals publish such information as is available and that some if not all of them charge for listings, and that any person may secure the listing of any securities which are deemed to be of sufficient interest to be included.

The inclusion or exclusion of a particular security is within the discretion of the publisher. Upon its inclusion, the security becomes exempt from the act under consideration. The bill of complaint (Record, pages 10 and 11) gives a list of the manuals aproved by the Commission. We have before us Moody's Manual of Railroads, 1916, and find this statement in the preface:

> "While the figures and data contained in the manual have been obtained from sources believed to be reliable and accurate, the publishers do not hold themselves responsible for the accuracy of any of the statements contained therein."

Opening the book at random, we happen to note at page 1551:

> "Crooked Creek R. R. & Coal Co. (Independent)" incorporated 1875 in Iowa. "Line of road Webster City to Lehigh, Ia., 17.61 miles; sidings, etc., 3.45 miles * * * Equipment: Locomotive 1; cars (box 68; coal 18) 86.
>
> "Receiverships, etc. * * * Sam McClure of Fort Dodge, Ia. was appointed Receiver on or about July 25, 1915. * * *
>
> "Capital Stock—outstanding $112,500.
>
> "Bonded Debt $112,500—July 1, 1915, interest defaulted. * * *

	Deficit for year.
1910-11	$2339
1911-12	5160
1912-13	11,557
1913-14	1,133
1914-15	9,581."

It is a well known fact that most of the dealers affected by the law, especially the local dealers, do business under the manual plan, listing their securities when necessary in the so-called "Michi-

gan Manual of Corporation Statistics" mentioned in the bill of complaint (Rec., page 11).

The manual provision is "the Michigan idea" of providing an easy way out of the act at all times. It is not so much an exemption of existing standard securities, as a working exemption available for new offerings to be listed as issued.

The following proviso is attached to the provision exempting securities listed in approved manuals:

> "Provided, however, that said Commission shall have the power to call for additional and further information than that contained in such manuals, with reference to any securities listed therein, and may, pending the filing of such information, suspend the sale of such securities, and also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice to the issuer of such securities if said Commission shall find that the sale of such securities would work a fraud upon the purchasers thereof."

There is nothing in the Act to indicate how the Commission are to learn that any particular security exempted under Section 3 is being offered in the State. Unfortunate indeed would be the position of a dealer with a block of Rock Island bonds if the sale thereof were permanently suspended "after a hearing upon notice to the issuer thereof." The importance of this plainly unconstitutional proviso lies in the fact that the exemption would not have been inserted without it, and that the Act would not have been adopted without the exemption.

Approach and Contact of Authorities.

1. *Arbitrary Power and Discretionary Authority Inadmissible.*

In *Yick Wo* v. *Hopkins,* 118 U. S., at page 370, the Court said that the principles of our institutions of government "do not mean to leave room for the play and action of purely personal and arbitrary power," adding:

> "* * * the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Mr. Justice Peckham in *Allgeyer* v. *Louisiana,* 165 U. S., 578, at page 589, said:

> "It was said by Mr. Justice Bradley in *Butchers' Union* v. *Crescent City Company,* 111 U. S., 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right.' It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with

> certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. Again on page 764, the learned Justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

In re Hollon Parker, 169 U. S., 221, Mr. Justice Field said (225):

> "Rights under our system of law and procedure do not rest in the discretionary power of any officer, judicial or otherwise."

2. *Administrative Control of Certain Matters Necessary.*

In *Lieberman* v. *Van de Carr*, 199 U. S., 552, the constitutionality was upheld of Section 66 of the New York Sanitary Code, which reads as follows:

> "No milk shall be received, held, kept, either for sale or delivered in the City of New York, without a permit in writing from the Board of Health, and subject to the conditions thereof."

The Court read the decision of the New York Court of Appeals as meaning that this provision was sustained as "the grant of power to issue or withold permits in the honest exercise of a reasonable discretion" (p. 559). The Court said, page 560:

> "That this Court will not interfere because the States have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the States to protect the health and safety of its people there can be no doubt."

And further that cases which it cited and reviewed

> "* * * leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment" (562).
>
> "* * * *If the business affected is one which may be properly the subject of such legislation*, it is no valid objection that similar legislation is not imposed on other businesses of a different kind."

In *Noble State Bank* v. *Haskell*, 219 U. S., 104, Holmes, J., expressed the opinion (p. 113) that the State control of banking "may go on from regulation to prohibition except upon such conditions as it may prescribe."

And in *Engel* v. *O'Malley*, 219 U. S., 128, in upholding the constitutionality of the New York statute of 1910, Chapter 348, forbidding individuals

or partnerships engaged in the business of receiving money for safe-keeping or transmission, from doing business without a license from the Comptroller, the Court pointed out that the business was one largely done by poor and ignorant immigrants, especially upon their first arrival here; that

> "* * * experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the State may regulate that business and may take strong measures to render it secure" (p. 136).

The Court said:

> "The power of the State to make the pursuit of a calling dependent upon obtaining a license is well established where safety seems to require it."

In *German-Alliance Insurance Co.* v. *Lewis*, 233 U. S., 389, a statute authorizing the Superintendent of Insurance to supervise and control the rates charged by fire insurance companies was upheld on the authority of *Munn* v. *Illinois* and *Budd* v. *New York*, on the ground that the insurance business was a business subject to regulation, no question being raised whatever as to its subjection to executive control for this purpose. The Court said (p. 414):

> "To the contention that the business is private we have opposed the conception of the public interests. We have shown that the business of insurance has very definite characteristics with a reach of influence and conse-

> quence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibilities. * * * The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest' and, therefore, subject 'to be controlled by the public for the common good' ".

In *Brazee* v. *People of Michigan*, 241 U. S., 340, it was held that the State, in the exercise of its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect to them to be enforced according to the legal discretion of a Commissioner, saying (p. 343):

> "The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them."

See, also, prohibition or administrative control upheld in

> Austin *v.* Tennessee, 179 U. S., 343 (prohibiting sale of cigarettes).
>
> Gundling *v.* Chicago, 177 U. S., 183 (license for sale of cigarettes).

Wilson *v.* Eureka City, 173 U. S., 32 (address on public grounds).

Jacobson *v.* Massachusetts, 197 U. S., 11 (vaccination).

Fisher *v.* St. Louis, 194 U. S., 361 (Keeping cow stable within City limits).

Mugler *v.* Kansas, 123 U. S., 623 (Liquor Prohibition).

Giozza *v.* Tiernan, 148 U. S., 657 (Liquor License).

The cases cited illustrate the far-reaching character of the executive or administrative control which may be created over "a business clothed with a public interest." The prohibition or the control given may be complete and unqualified. The State "may go on from regulation to prohibition except upon such conditions as it may prescribe." A man may not do such business "without a permit" from a state board and "subject to the conditions thereof." The Legislature may grant or withhold this complete administrative power, it may prescribe standards or rules to control it, but whether it grants, withholds or conditions it, there is no question of its power to grant it completely; that is, there is no question of constitutional prohibition or of the separation of governmental powers or of the delegation of legislative powers. The power is historically and properly administrative, subject, as all powers, to protection against its "purely personal and arbitrary" exercise. This complete power may, we take it, be given over many matters, which, on one or more special and distinctive grounds, both require and are susceptible of such control, including many quasi-public businesses, and businesses involving special dangers to the public or to a community, as well as over government agencies and government

property, including parks, highways and navigable rivers, and matters of international character such as aliens and foreign commerce (see cases under Point III).

3. *Legislative Restrictions and Safeguards Proper.*

The cases above cited deal with administrative control over matters of public right or public grant or existing at public sufferance. The Legislature may deal drastically with many matters of private right, to prevent or redress individual wrongs. Drastic remedies may be prescribed *by law* for evils deemed by the Legislature to require them. These include "that wide department of activity which consists of the making of contracts," as to which "restrictive safeguards" may be required, for "liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions" (Chicago, B. & Q. R. R. Co. *v.* McGuire, 219 U. S., 549, p. 567). It permits "legislation in the exercise of the police power which regulates the manner of the use or disposition of property" (Spurr *v.* Travis, 145 Mich., 721, p. 724; upholding the Michigan Bulk-Sales Act, sustained by this Court in Kidd *v.* Musselman, 217 U. S., 461).

In Brodnax *v.* Missouri, 219 U. S., 285, the Court upheld a statute of Missouri which prohibited the keeping of places for dealing in stocks, bonds and commodities for future delivery "without at the time of the sale the seller shall cause to be made a complete record of the things sold, the purchaser and the time of delivery in a book kept for that purpose," and deliver a written memorandum with a stamp affixed thereon.

In Otis *v.* Parker, 187 U. S., 606, the Court upheld a provision of the California constitution de-

claring void all contracts for the sale of stock on margin, and Holmes, J., said at page 610:

> "There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has."

See also similar statutes upheld in

Knoxville Iron Co. v. *Harbison,* 183 U. S., 13 (requiring redemption in cash of "pay scrip");

Rosenthal v. *New York,* 226 U. S., 260 (requiring second-hand dealers to make inquiry as to ownership);

Schmidinger v. *Chicago,* 226 U. S., 578 (prescribing size of loaves of bread);

Lemieux v. *Young,* 211 U. S., 489;

Plumley v. *Massachusetts,* 155 U. S., 461 (prohibiting sale of oleomargarine colored to resemble butter);

House v. *Mayes,* 219 U. S., 270 (requiring sales by actual weight without deduction under any custom or rule of any Board of Trade);

Savage *v.* Jones, 225 U. S., 501, and Patapsco, etc., Co. *v.* North Carolina, 171 U. S., 345, and other inspection cases. (Prohibiting the sale of products for special use not meeting prescribed standard determinable by physical inspection, or chemical analysis, all based on principle stated in Gibbons *v.* Ogden, 9 Wheat., 1, 203, and Turner *v.* Maryland, 137 U. S., 38.)

State v. *Holton,* 148 Iowa, 724 (requiring linseed oil to be labelled to prevent deception).

"The Statute of Frauds, the act to prevent fraudulent conveyances, insolvent laws, the Recording Act, the prohibition of usury, lien laws, regulations in relation to chattel mortgages, conditional sales and preferences by corporations and in general assignments, show in how many ways and in what varied forms the Legislature may properly restrain freedom of action in commercial transactions in order to promote the general welfare."

Vann, J., dissenting Opinion in Wright *v.* Hart, 182 N. Y., 330, 348.

Cited and approved in Lemieux *v.* Young, 211 U. S., 489, at 493, 495.

It is the contention of the appellees that whatever evil exists within the field covered by this Act falls within the general legislative power and should be dealt with on the principles and precedents of ordinary remedial legislation. That the business neither requires nor justifies, nor is susceptible of, administrative or executive control for the purpose of preventing a wrong or injury by one individual to another.

4. *Whether regulative or restrictive, legislation must not be plainly violative of constitutional rights.*

In *Gundling* v. *Chicago, supra,* Mr. Justice Peckham, at page 188, said:

"* * * unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unneces-

sarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

In Lawton *v.* Steele, 152 U. S., 133, at page 137, it was said by Mr. Justice Brown:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts."

ORIGIN OF BLUE SKY LEGISLATION.

In his brief before the lower Court in the case involving the Michigan Act of 1913, the present Attorney General said:

> "Get-rich-quick schemes have sprung up all over the country; visionary oil wells, not gushing but just ready to gush, have been capitalized and sold in untold millions to the American people; gold mines upon paper of fabulous richness have been discovered (?) in every part of the civilized and uncivilized globe, capitalized for millions and the stock sold to the unsuspecting laboring man and farmer. Every conceivable scheme to separate the frugal from their money have been de-

> vised by the shrewd and cunning in their wild cat ventures. Michigan has not been alone in this dilemma. This Act is designed to put a stop to the seepage of untold millions from the pockets of the frugal to the pockets of the unscrupulous."

And in his present brief for appellant, he says, page 80:

> "The purpose of the Act here involved must be apparent to the Court, the purpose being that no one shall be permitted to sell in the State of Michigan and separate the people of the State from their money through the medium of fraudulent mining stocks, oil stocks and other fly-by-night ventures."

An extremely friendly student of this whole subject, Hon. Thomas Mulvey, Under Secretary of State of Canada, made an exhaustive investigation of it in 1913. We quote as follows from the printed report which he prepared for the State Department covering this investigation:

> "For the purpose of making a close investigation of the operation of the Kansas law I went to Topeka some months ago, and studied its operations in the office of the Banking Commission. I also discussed it with the Attorney General and the Secretary of State of Kansas and with many lawyers and business men of Topeka, Kansas City, Kansas; and Kansas City, Missouri.
>
> "Prior to the election in the State of Kansas preceding the last, Mr. J. N. Dolley was the Chairman of the Republican State Committee, and as he was a prominent merchant and president of a local savings bank, on the return of his party to office he was made Bank Commissioner. Mr. Dolley established a branch of his office for the purpose of investi-

gating securities offered generally throughout the State, and for the purpose of showing the advantage of the Department, gave the matter as great publicity as possible through the press, as shown by the following:

'STATE OF KANSAS
'Office of Bank Commissioner.

'J. N. Dolley,
'Bank Commissioner.

"Topeka, December 16, 1910.

'To the Editor:

'About one year ago the banking department organized a bureau to investigate the sale of stocks, bonds and other securities in Kansas. We have made much research along these lines, and are amazed at the enormous amount of money the Kansas people are being swindled out of by these fakers and 'blue-sky merchants.' I find that Kansas is literally infested with them.

'They are sitting around, and when a man dies the widow receives her pittance of insurance—one, two or three thousand dollars, as the case may be, mostly from fraternal insurance. These thieves show up a few days after the funeral and undertake to sell the widow some of their fake stock, promising her dividends of anywhere from fifteen to fifty per cent. per annum. They are getting a large amount of money from this source, as well as a great many other sources, and their victims are mostly those who are unacquainted with business methods, but are hard-working, frugal, saving people, and can ill afford to lose the money.

'I find that Kansas has been tolled millions and millions of dollars during the past few years by these confidence men, and ninety-eight per cent. of the money so paid has been entirely lost by the investor.

As near as I can ascertain, they are tolling Kansas at the rate of somewhere between one and three millions of dollars per annum. Scores of them have quickly packed their grips and left the State upon this department starting to look them up. I do not believe that there are one-third as many operating in Kansas today as there were one year ago, and I propose, through the newspapers, with publicity to drive every one of these thieves possible from our State. *I will ask the Legislature for a law clothing some department of State with the power to remove these financial cancers entirely from our State, and I am sure, with the proper help of the Legislature we can do so.*

'I sent the papers an announcement several months ago which they kindly published, warning their subscribers and I now wish to thank them for their kind assistance at that time. I enclose you a blank that I would like to have you print in your valuable paper, so that any one of your subscribers, if they wish information along these lines, may clip the same from your paper, fill it out and mail to this department, and I am sure we can give them some valuable advice and *be of much assistance to them in investing their money where it will not be lost.*

'I regret very much that I have no funds to pay you for this work and am obliged to ask you to do it gratis, but I know that you are interested in stopping this dishonest flow of money from Kansas and keep it within the State to develop our vast resources and at the same time protect your subscribers and the class of people who are being robbed, many of whom are helpless against the intrigues and dishonesty of these get-rich-quick vultures * * *.'

"Immediately after the passing of the Statute of 1911 Mr. Dolley commenced a cam-

paign of publicity of its terms and virtues, and I think it is due to him to state that there have been few if any Statutes which have been so thoroughly advertised through the press and magazines of the United States.

"Mr. Dolley in his first report of the operation of the Act, published 1st September, 1912, states as follows:

> 'The Department succeeded in getting the last Legislature to pass House Bill 906, commonly known as the Kansas "Blue-Sky" law, providing for the regulation and supervision of the sale of stocks, bonds, and other securities. This law, as you know, was something entirely new in the business world, but I am pleased to inform you that we have worked the same out in a very nice shape and accomplished some wonderful results. I estimate that it has saved the people of this State at least six million dollars since its enactment. Between fourteen and fifteen hundred companies have been investigated by this Department since the enactment of this law, and of this number less than one hundred have been granted permits to sell their securities in Kansas. The law is rapidly gaining fame all over the civilized world and I believe that a large number of the States will adopt a similar law at the coming sessions of their Legislatures. *I believe that a movement has been started that will eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised.* There are a few minor amendments that should be made to this law, which I will be pleased to recommend to the Legislature at the proper time.'

"It will be noticed that Mr. Dolley states that 'between fourteen and fifteen hundred companies have been investigated by the Department, and that of this number less than

one hundred have been granted permits to sell securities.' A personal investigation of the files of the Bank Commissioners' office casts serious doubt upon the accuracy of this statement. All the officials of the office have been changed, and it is a matter of great difficulty to obtain reliable information upon the working of the Act. I may say, however, that the figures given to me by the Assistant Commissioner of Banking are as follows: Up to the 1st of April, 1913, permits were granted to forty-nine companies and refused to sixty-two. Permits were granted and subsequently cancelled in three cases, and the applications under the Act numbered about 1,600. It was further explained to me that Mr. Dolley's statement in his report that this large number was investigated means that that number of applications had been received and held for consideration. In the course of my inquiries, I ascertained that the Co-Operative Harvester Association, an Illinois company, applied for a permit to dispose of its securities to the extent of $700,000 in the State of Kansas, and that what was described as a 'temporary permit' given to it. There seems to be no provision in the Statute for such a permit, but I was informed that Mr. Dolley decided that the exigencies of the situation demanded that in order not to stop business such permits should be given. This company proceeded to sell its securities. Some time later, during correspondence between the company and the Bank Commissioner a point was reached at which the company refused to give additional information which the Bank Commissioner required, and the company decided to retire from the State. In the meantime, I am told that it had sold the greater portion of the securities for which they required a permit. The company is now in liquidation, and it is likely that all the capital invested will be lost. I was also informed of other cases where

temporary permits have been given and gross fraud has been perpetrated.

"I discussed the results of my investigation in conversation with Dr. H. A. Millis, Professor of Economics at the University of Kansas, at Lawrence, Kan., who had on several occasions checked the files of the office of the Banking Commissioner. He confirmed my results, with this exception, that the number of companies to which permits were given and permits refused are scarcely accurate, but the difference is so small as to be negligible in discussing the subject. It is apparent that the provision for investigation and permit was in effect inoperative, and it was a matter of surprise to find that with scarcely an exception the highest praise was given to this Statute by everyone with whom I discussed the subject, both at Kansas City, Mo., and Kansas City, Kan., and Topeka, Kan., the universal belief being that the number of fraudulent securities offered has been very largely decreased, and the character of the persons offering securities has been raised. *In my investigation I came to the conclusion that the clause of the Statute which required the vendors of securities to obtain a certificate from the Banking Commissioner is entitled to all the credit for that result.* The Statute was so widely advertised, and the statement that it was being stringently enforced became so widely circulated that vendors of questionable securities were frightened away. *If there is any virtue whatever in the Statute, it appears to me to be owing to this particular provision.* I may say that I discussed this deduction with several prominent lawyers in Kansas City and they agreed with my conclusion."

See also article by Mr. Mulvey in the American Economic Review of September, 1914. He quotes the following from the report of the British Board

of Trade, based on an investigation of this general subject in 1895:

> "Your committee may observe that they have dismissed from their consideration every suggestion for a public inquiry by the registrar or other official authority, into the soundness, good faith, and prospects of the undertaking at this or any other stage of the company's formation. To make any such investigation into the position of every new company complete or effectual would demand a very numerous staff of trained officers, and lead to great delay and expense, while an incomplete or perfunctory investigation would be worse than none. It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the state, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses."

These quotations make it clear that the evil aimed at in this legislation was primarily that of the so-called get-rich-quick concerns promising enormous gains. They also make it clear that the Kansas Act was practically incapable of enforcement according to its terms and that as applied to concerns, the fraud of which was not obvious in the first instance the sanction of the state was given, with the result that large losses were sustained, presumably by the very class of investors sought to be protected, those who needed "assistance in investing their money where it will not be lost."

Despite the repeated generalizations as to the extent of loss through fraud in "get-rich-quick" securities, it is impossible to get from official or any other source a reliable estimate, even an approximate estimate, of actual losses. The statements published cannot be verified by those who

make them. Much less is it possible to ascertain to what extent such losses are due to fraud in the actual sale of securities. Many of these statements are attributed to the Post Office Deparment. But our inquiry at the Department for specific information has made it clear that it has issued none, and that there is none.

The reports of the Chief Inspector of the Department show many persons convicted, "charged with using the mails in furtherance of schemes to defraud," and estimates of losses from such frauds. But relatively few of them seem to be securities frauds. In one important item listed in the 1913 report as a stock selling-proposition involving an estimated loss of $6,000,000, what were really sold seem to have been "contracts" requiring monthly payments and providing for an ownership of one acre of land in Mexico. Including this typical case, the cases listed showed twelve "sale of stock" schemes, one "sale of bonds," one "guaranteeing stocks and bonds" and one "issuing of bonds in connection with irrigation schemes," out of a total of over 200 fraud cases resulting in 304 convictions. The figures for 1914 are similar.

The report for 1914 refers to the fact that "the activity of the department during the last year in the issuance of fraud orders has effected a saving to the public of hundreds of thousands of dollars." Possibly a printer's error has converted "hundreds of thousands" into the "hundreds of millions" mentioned in the recent opinion of the North Carolina Supreme Court in State *v.* Agey, cited by the appellants.

As against these estimates of losses in various "fake" schemes, a part of which are stock flotations, may be cited the fact that close to $2,000,000,000

in new securities are issued and that several more billions change hands every year.

There is not and has not been any charge that fraud is prevalent in this normal business.

Mention should be made of the causes of losses other than fraud which without doubt enter very largely into the loose estimates made by every one on this subject. These causes are as variable as the transactions in which they occur. One degree removed from fraud is the reckless optimism of the promoter who believes in his enterprise and without sufficient capital himself seeks other people's money to finance his hopes. The ultimate failure is frequently due to the inability to raise sufficient funds actually to carry through a potent[illegible] profitable venture. In other cases the enti[illegible]osition is unsound, but neither the promo[illegible]s associates have the business judgm[illegible]ne fact.

Professor Dewing's volur[illegible]ate Promotions and Reorganizatio[illegible]ublished in 1914, furnishes much food for thought to those studying this question. He makes quite clear the general proposition that a part of the losses in industrial securities are due to mistakes of financing or organization, but much the larger part to subsequent incompetence and bad management or misfortune in the operation of the company.

It cannot, we think, be assumed that any Legislature, by investigation or otherwise, could have ascertained more than is known among the best informed writers and students of this subject. It is more likely, and in fact quite evident from the legislation itself that they did not even ascertain this, but acted upon the general popular misinformation, confusing fraud in the sale of securities with fraud in the operation of the business, and

magnifying many times the actual importance of fraud as a cause of loss in securities.

The Court will take judicial notice of the general course of business known to intelligent men.

The Normal Business Affected by Blue Sky Legislation.

The "Blue Sky" evil intended to be reached by this legislation is, as we have seen, that of the "Blue Sky merchant" and "fly-by-night" promoter of "get-rich-quick" enterprises. As the lower Court said in the first Michigan decision:

> "If just this intent had been carried into effect by the act as passed, these cases would not be here; but scrutiny of the law discloses additional and very different effects; it is not confined to corporations, but covers partnerships issuing, and individuals dealing in, securities; it does not relate alone to stocks, but as well to bonds, mortgages, and promissory notes; it is not limited to investment companies, as that term would ordinarily be defined, but extends the definition so that it may include most of the private corporations and partnerships in the United States; it does not cover fraudulent securities merely, but reaches and prohibits the sale of securities that are honest, valid, and safe; it does not simply protect the unwary citizen against fraudulent misleading, but it prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to offset the risk of loss, or which, from motives of pride, sympahy, or charity, he is willing to aid, notwithstanding a probability that his investment will prove unprofitable. Of course, not all of these results always follow; but some of them always may, and sometimes will. Take concrete instances. A merchandising partnership cannot borrow

additional capital from its home bankers on long time notes (over nine months) unless the Commission approves. If a timber company is insolvent, no one can deal in its first mortgage or underlying bonds, though these bonds are perfectly good, are not in default and not likely to be, nor can the Commission permit such dealing if it would. A successful automobile or furniture company may not increase and sell its capital stock, save by the Commission's approval, and, if such a company has not been successful and the Commission thinks it is not likely to be, the company must liquidate; it will not be permitted to get new capital. If a company is organized to make and sell a new invention, and if the Commission thinks the enterprise will not succeed the stock may not be sold, even to skilled bankers who have investigated thoroughly and still desire to buy. If, through local pride or in the effort to save an existing investment or from any indirect benefit to come, the citizens of a town wish to take stock or bonds in a local company, though knowing they are likely to lose their investment and being willing to take the chance, yet they may not; this law forbids."

Alabama & N. O. T. Co. et al. v. *Doyle et al.*, 210 Fed. Rep., 173, 175.

The present act is different in detail, but not in principle from the 1913 Michigan Act referred to by the Court. The business and transactions which it covers are not, in any definitive sense, connected with the Blue Sky evil. That evil is included in the broad generalities of the act, just as it would be included in any act dealing with the purchase and sale of property generally. The act covers expressly and prohibitively the borrowing or raising of money by stocks, bonds or secured or

non-negotiable notes by any person, partnership or company (except approved utility securities), and the entire business of buying and selling any such securities and the individual transactions involved in the continued or successive offer and sale of securities. Securities listed in so-called standard manuals are exempted from the primary prohibitions of the Act, but are subject at any time to prohibition by the Commission.

The Act covers, first, the future purchase and sale of billions of investment securities outstanding when it took effect. Whatever evils existed in the issuance of a small part of these outstanding securities was beyond remedy when the act was adopted. The securities themselves were lawful property rights.

The act covers, second, securities hereafter issued and which may become the subject of offer or sale within the State. Normally most of these securities would be issued in and under the laws of other States and become the property of individuals and companies, both within and without the State, before they came to be offered directly in the State. Here also any evils incident to the issuing of securities are beyond remedy when the securities come into the State. Here also the securities are the property of those who own and wish to sell them in the States.

The business concerns affected by the act are the investment dealers or so-called "investment bankers," numbering many hundreds, some of them very large houses with branch or allied houses in many cities of the country; others are relatively small but do a large aggregate business throughout the country. The business is essentially competitive.

The larger part of the business is normally interstate, carried on by houses in ten to twenty of the largest cities of the country. These houses buy and sell securities on their own account. They buy primarily for distribution to investors. They have an established clientele with whom they deal by mail or through agents. The total of this business must be at least a hundred times as large as the "get-rich-quick" dealings which are the professed object of this legislation. A large part of this business consists of the purchase of original issues of securities from the issuing company, after an exhaustive investigation by engineering, industrial and legal experts.

In all that has been said and written in litigation and in legislation in the past three years, it has, we believe, been nowhere suggested that there is in this normal business any abnormal degree of fraud.

This normal business is an investment business. The securities sold have no speculative feature in the sense of promising anything above a normal return or increase of value.

Unlike the speculative promotions, this business is normally carried on on a relatively moderate profit, a profit that could not hope to stand the expense involved in any serious effort by particular States to duplicate, each for itself, the expert examination necessary to protect the public against an assumed fraud.

These considerations are so fundamental that the idea of actually exercising the power given by the Blue Sky Acts against this normal business has been deprecated by the State officials themselves. They practically elect to ignore the acts and to accept the offerings of the established

houses on faith. But for this fact, the Blue Sky laws would undoubtedly be completely destructive of this business.

It should be added that, despite the fact that these laws have not been enforced according to their terms, they have in a substantial degree hindered and destroyed the normal business, particularly between the States. They have tended also to throw the business into the hands of resident houses, licensed in the particular State. If they are upheld and enforced, these effects will undoubtedly be farreaching and disastrous, both upon the interstate business as such and upon the present wide distribution of securities which is vital to our industrial and financial welfare.

Blue Sky Legislation.

As stated by Mr. Mulvey, the original Kansas Act of 1911 was widely if not altogether accurately advertised, and was followed in 1913 by a number of statutes, which are cited in appellants' brief. It is not correct, however, to say that these statutes were all based on the Kansas Act or all similar to it.

Blue sky bills were vetoed in Indiana and Colorado in 1913 and defeated by referendum in Washington in 1915. The Attorney General of Indiana in a sweeping opinion advised the Governor that the bill was unconstitutional, citing Baltimore, &c., R. R. *v.* Voight, 176 U. S., 498, and, referring to the sanction given by the State to an undetected fraud, added that "the bill, instead of assisting to close the door against fraud, would tend to throw it wide open and aid the fraudulent dealer to secure his victim's money."

The Kansas Act, apparently without any prior intention, went far beyond its professed pur-

pose of reaching the get-rich-quick concerns, and instead of dealing effectively with an exceptional class of dangerous business, practically subjected every transaction of purchase and sale of securities to prohibitions and provisions in terms completely unworkable and destructive of the normal business. Without making any distinction between the business concern issuing notes, bonds or stocks, and the dealer in or owner selling securities, classing them all as "investment companies," it prohibited every transaction unless the issuer or seller submitted a mass of specified detail and obtained in advance the approval of the Bank Commissioner based upon a detailed investigation of its or his financial condition and proposed contract, and placed itself or himself under the continued supervision and life-and-death power of the Commission. The assumption seemed to be that all securities were sold only by an issuing promoter. It or he, the promoter, dealer or seller covered by the Act, was required to pay a filing fee of $25 and was only permitted to sell securities that were approved upon a finding of his solvency, and that the "proposed plan of business and proposed contracts, contained and provided for a fair, just and equitable plan for the transaction of business and * * * promises a fair return on the stocks, bonds, contracts or other securities by it offered for sale."

The Kansas Act in its inception, as enforced, was simply a club with which the Bank Commissioner, when and as he chose, could drive any dealer from the State. Such was its value and its efficiency. Its harm and its inefficiency lay in the instances mentioned by Mr. Mulvey. These were not advertised or generally known, outside of Kansas, in 1913.

These crude provisions found their way in one form or another into the statutes of a number of States. *The fact that an Act as crude and completely unworkable as the Kansas Act was copied literally in so many states with equally crude changes in some, speaks volumes for the lack of any intelligent demand or interest in the subject.* In Michigan and Iowa, as in other states, efforts were made to so adjust the law to the facts as to permit legitimate business to be carried on, but owing to the fact that a violation of the Michigan Act was declared to be a felony, and to the fact that under the Iowa Act a bond in the sum of $5,000 was required, to be given conditioned upon a "strict compliance" with the Act, it seemed unsafe for legitimate dealers to attempt to carry on business under them, even though the officials charged with the enforcement of the Acts seemed desirous of waiving their drastic provisions. Suits were accordingly brought to contest the constitutionality of those two Acts, with the result that they were declared unconstitutional in the cases cited below.

Following the Michigan and Iowa decisions, a general discussion of the subject took place at the 1914 convention of the National Association of Supervisors of State Banks, whose members, we believe, included most of the State officials having charge of the actual enforcement of the laws. In this discussion the new Kansas Commissioner stated that "get-rich-quick" securities so-called are not offered in Kansas. They are kept out by the mere fact that we have such a law." Other officials deprecated various features of the laws, noting specially the dangerous sanction which it gave to "ap-

proved securities." The printed report of the convention is, we believe, available (pp. 47-59).

Upon the invitation of the abovenamed Association the Investment Bankers Association of America, which had participated in the attacks upon the Michigan and Iowa Acts, was represented at this discussion by its counsel, who urged that the "get-rich-quick evil should be met by constructive legislation directed against fraud in the sale of securities, and requiring specific safeguards to insure the effective investigation and prosecution of such frauds (pp. 35-44). A resolution was unanimously adopted under which a committee was appointed to "co-operate with the so-called investment bankers to secure uniform laws which will be practical in effect" (p. 116).

This Committee presented a form of fraud act at the 1915 convention of the same Association, which is printed with the proceedings of that convention (Report, pp. 53,54; Act, pp. 121-123). We print it, with the Committee's report as an appendix to this brief.

The Courts below have seemed to feel, and this Court may feel, quite properly, that we should be able to present some plan of act to demonstrate that the "get-rich-quick" evil can be met without resort to legislation of the present character. We point to the Bank Supervisors' Act, the Virginia 1916 Act (P. L. 835), and the Louisiana "itinerant agent" act (Laws 1912, Act 40).

A letter from the Attorney-General of Michigan was read at the 1914 convention of the Bank Supervisors' Association, in which he expressed the view that the decision in the *Doyle* case, *infra*, was unsound, and that "the general scheme of the Michigan Law to my mind is the proper scheme to

be worked out." Three months later the 1914 convention of the Attorneys General Association was held in Washington. The retiring President of the Bank Supervisors Association, the Bank Superintendent of Michigan, endeavored to arrange through the Attorney General of Michigan for a further discussion of the subject at the convention of the Attorneys General Association. This effort was unsuccessful, and at the latter convention, we understand upon the instance of the Attorney General of Michigan, and without any discussion of the subject, a Committee was appointed, consisting of the Attorneys General of Michigan, Iowa, and Arkansas, all of whom had been active in defence of the 1913 Acts. A further effort was made to cooperate with this Committee, but without the least success. Just as the Legislatures met in 1915, this Committee presented a form of act which with unimportant changes was immediately adopted in Michigan, and two or three other States, though not in Iowa. This Act represented apparently the work and views of the Attorney General of Michigan, and was, as he had forecast, based upon the 1913 Michigan Act.

This is the Act now before the Court.

Revised acts were also adopted in Iowa, Oregon, West Virginia, Kansas and North Dakota, entirely different from the Michigan Act. No new acts seem to have been adopted in any new States. The Wisconsin Act has been amended in 1916, doing away with the licensing of dealers, apparently on the view that it is unconstitutional and also unnecessary (Citations on Appellant's Brief, pp. 94-95).

Principle at Stake.

The principle of all this legislation is the same. The law of the land" is to be the will of the executive, telling one man to do, another not to do, a particular thing. It rests on *"the opinion"* of an administrative board or officer based on his own investigation as to the motive, character, or probable outcome of the private transactions of the individual. Some popular leaders and some Legislatures believe this principle to be constitutional. Some magazine writers have so assured them, and some lawyers have cited *dicta* from some decisions to support the view. The exception is said to be the rule, and established theories of government are said to have been abandoned.

The answer of course rests with this great Court. If we read aright its former decisions, they contain no authority for the widespread view that the conduct of any and all transactions of the business world may be subjected to the discretionary control of Boards or Commissions. The application of such government to different forms of quasi-public business has, we submit, represented not a change in the law, nor an extension of the executive power, but a change in the condition subject to the law and an application of that power to the changed conditions. The license and control of the village hack driver has been, not extended, but applied to the regulation of our great railroads. The control over banks has been, not extended, but applied to insurance companies and building and loan associations.

This development of legislation is largely a matter of the last five years. This is, we believe, the first case that has reached this Court, involving the

constitutionality of this principle of executive control over private business and individual transactions. Taking the view we do, we may be pardoned if we seem to exaggerate the importance of this case, and for the thought that the decision, one way or the other, must be epochal in its effect on the future government of the states and nation. We find ourselves entirely opposed to the popular view held by many lawyers, that this Court, has changed or will change the principles that have guided it in the interpretation of the Constitutional safeguards of the individual.

The Blue Sky Decisions.

There have now been a number of decisions in connection with the so-called "blue-sky" acts. In but six cases, however, has the constitutionality of such acts been really decided, and in each such case the Act has been held unconstitutional. These decisions cover the former Michigan, Iowa and West Virginia statutes, and the 1915 Michigan and South Dakota Acts, and the 1913 Ohio Act as amended. The West Virginia decision practically covered the original Kansas Act and those of other states based upon it. Fourteen Federal Judges five Circuit and nine District Judges, have now concurred in the opinion of the Court on the former Michigan Act and there has been no expressed dissent to that view.

The opinion in Alabama Trans. Co. *v.* Doyle 210 Fed., 173 (Sixth Circuit, Denison, C. J.; Sessions and Tuttle, D. JJ., all concurring), was cited and followed in Compton Co. *v.* Allen, 216 Fed., 537 (Eighth Circuit, Smith, C. J., McPherson and Pollock, D. JJ., all concurring).

And in Bracey *v.* Darst, 218 Fed., 482 (Fourth

Circuit), Dayton, D. J., Pritchard, C. J., concurring, after distinguishing *ex parte* Taylor, *infra*, discussing the statutes of several States, and construing the Act in the light of the Michigan and Iowa cases, concluded with the statement (496):

> "The opinions in the Iowa and Michigan cases are so clear, sound and convincing as to not only command our admiration, but lead us to the conclusion that nothing more complete and effective can be added to them."

The dissenting opinion of Circuit Judge Wood was based on a construction of the West Virginia Act, which took it out of the category of the other Acts, making it apply apparently only to corporations and those organized combinations of individuals whose business is "to raise money by the sale of the securities of such an organization to the public—that is to anyone who will buy." This construction in the opinion of the majority practically rewrote the statute. Referring to the Federal Court decisions on the Michigan and Iowa Acts, Judge Wood, simply said (502):

> "The statutes as construed in these opinions are more restrictive of the sale of securities than we find the West Virginia statutes to be."

In the case of Sioux Falls, etc., Co. *v.* Caldwell, now before this Court, reported in a footnote to the Ohio case (230 Fed., 236), the Federal Court (Judges Sanborn, Munger and Elliott) granted a restraining order *pendente lite*, the order reciting that

> "in the opinion of the Court, Chapter 275 of the Session Laws of the State of South Dakota for the year 1915, is violative of the Constitution of the United States, and this

> opinion is confirmed by the decisions in Alabama & N. O. Transportation Co. *v.* Doyle (D. C.), 210 Fed., 173; Wm. R. Compton Co. *v.* Allen *et al.* (D. C.), 216 Fed., 537 and Bracey *v.* Darst (C. D.), 218 Fed., 482."

This was followed by the decision of the lower Court on the 1915 Michigan Act, Judges Denison, Sessions and Tuttle, (228 Fed., 805), and by the decision on the Ohio Act, Judges Warrington, Sater and Hollister, (230 Fed., 233), both of which are now before this Court.

The other decisions are the following:

Ex parte Taylor, 66 So., 292 (Fla.), which upheld the Florida Act, the Act applying only to corporations selling their own securities, upon the power of the State "to limit and regulate the powers and operations of corporations which it brings into existence" (see West Virginia opinion, *supra*, discussing Taylor case).

Mechanics B. & L. Assn. *v.* Coffman, 110 Ark., 269, 162 S. W., 1090, in which the State Supreme Court upheld the former Arkansas Act, attacked at the suit of a building and loan association, solely on the ground that a building and loan association is subject to regulation.

Standard Home Co. *v.* Davis, 217 Fed., 904 (8th Circuit, Trieber, D. J.), in which the former Arkansas Act was attacked at the suit of a land-contract company. The Court dismissed the bill, saying in part (914, 915):

> "It is a well settled rule of law that a statute will not be declared unconstitutional at the instance of one not affected by it * * * The allegations in the bill, as set out in the statement of facts, show the complainant is not engaged in the sale of stocks, bonds,

> or other securities, as were the complainants in Alabama, etc., Transportation Co. *v.* Doyle (D. C.), 210 Fed., 173 (construing the Michigan 'blue sky' Statute), and in William R. Compton Co. *v.* Allen, 216 Fed., 537, decided by the District Court of the United States for the Southern District of Iowa (involving the Iowa Statute). Therefore these cases are not applicable to the instant case."

State *v.* Agey, 88 S. E., 726, which upheld the North Carolina Act of 1913, as applying to a concern similar to that as to which the former Arkansas Act was upheld.

We repeat, therefore, that nowhere in the lower Federal Court or in the Supreme Courts of any of the States, has there been any dissent by even a single judge to the principle announced in the first Michigan case, holding the Act void as applied to ordinary dealers in investment securities.

POINTS.

I.

The appellees are entitled to sue in equity to prevent "unlawful interference by criminal proceedings" against their agents, which would destroy their property and business.

II.

One who "in the course of continued or successive transactions of a similar nature" offers or sells stocks, bonds or other securities owned by him, cannot be prohibited from continuing such "business" except under executive license, subject to revocation.

III.

One who "in the course of continued or successive transactions of a similar nature" offers or sells securities owned by him, cannot be prohibited from making a particular offering or sale, except upon "certificate of authority" from a State Commission.

IV.

The so-called Standard Manual Feature of Act is unconstitutional and void.

V.

"The regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrarily interfered with or destroyed without due process of law."

VI.

The act impairs the freedom of commerce between the states.

POINT I.

The plaintiffs are entitled to sue in equity to prevent "unlawful interference by criminal proceedings" which would destroy their property and business.

Ex parte Young, 209 U. S., 123.
Ludwig v. *Western Union Tel. Co.,* 216 U. S., 146.
Western Union Tel. Co. v. *Andrews, ibid.,* 165.
Herndon v. *Chicago R. I. & P. R. Co.,* 218 U. S., 135.
Missouri P. Ry. Co. v. *Tucker,* 230 U. S., 337.
Dobbins v. *Los Angeles,* 195 U. S., 223, 241.

The objection to the jurisdiction was urged in the Court below and is covered by the assignments.

In the *Young* case, the Attorney General of the State petitioned for writ of *habeas corpus* to be released from custody, being under arrest for disobeying an order enjoining him from instituting certain criminal proceedings under a State statute. The petition was dismissed, and the proceedings below sustained, and it was held that the Federal Court had undoubted power to restrain the enforcement of the State law, the Court saying (146):

> "The result would be a denial of any hearing to the company. The observations upon a similar question, made by Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S., 79, * * * are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal

protection when he is allowed to come into Court and make his claim or defense, subject to the condition that upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: * * * 'But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the Courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the law.'

* * * * * *

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the Circuit Court had jurisdiction under the cases already cited (and it was therefore its duty) to inquire whether the rates permitted by these acts or orders were too low and therefore confiscatory, and, if so held, that the Court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect.

* * * * * *

"* * * It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional

> enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality, with reference, at least, to the Federal Constitution, be first raised in a Federal Court, that Court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other Courts.
>
> * * * * * *
>
> "Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid."

In the *Ludwig* case, the Court affirmed a decree below enjoining the threatened proclamation by the Secretary of State under a State statute that the company was forbidden to do local business within the State. And in the *Western Union Telegraph Company* case, following it, argued and decided at the same time, the Court reversed a decree below dismissing the bill against the prosecuting attorney to enjoin him from bringing an action to recover penalties under the same act, saying (166):

> "It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled upon the question of jurisdiction by the case of *ex parte Young*, it is unnecessary to consider the question further."

In the *Herndon* case, the Court affirmed a decree enjoining the prosecuting attorney from enforcing the penalties of a State statute, and restraining the Secretary of State from revoking the complainant's right to do business, saying:

"The bill avers that Harry T. Herndon, as prosecuting attorney for the County of Clinton, Missouri, threatens to and it will, unless enjoined, put in motion the special provisions of the Act of March 19, 1907, for the enforcement of penalties of $25 per day since July 21, 1907, which penalties in a short time would amount to many thousands of dollars. * * * As to the objection that the suit is one against the State, we think no discussion is necessary, and content ourselves with a reference to the late cases in this Court to that point."

Citing,

Ex parte Young, and
Western Union v. *Andrews*, *supra*.

In the *Dobbins* case, the Court restrained the enforcement of an ordinance preventing the erection of a gas works in the territory including plaintiff's premises upon which a gas works was in course of erection. The proceedings taken by the city and restrained by the act, involved simply *the arrest of employees*, the effect being to prevent the completion of the buildings. The Court said, referring to the efforts of the plaintiff to complete the building (241):

"She had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

"It is well settled that where property rights will be destroyed, *unlawful interference by criminal proceedings* under a void law or ordinance may be reached and controlled by a decree of a court of equity (Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S., 207, 218, and cases therein cited)."

POINT II.

One who "in the course of continued or successive transactions of a similar nature" offers or sells stocks, bonds or other securities owned by him, cannot be prohibited from continuing such "business" except under executive license, subject to revocation.

For the purpose of this brief we accept the definition of the act as confining its operation to those actually engaged as dealers in the business of buying and selling securities. We emphasize, however, the fact that it applies to dealers, as distinguished from brokers, and that by dealers we mean those who for a livelihood purchase and sell securities on their own account. This "business" is in its essence nothing more nor less than what is defined in the present act, the purchase and sale of securities "in the course of continued and successive transactions of a similar nature". It is simply the relative status of the active trader as compared with the occasional vendor. Neither in theory nor in practice is there any defined line between the individual who becomes more and more active in buying and selling investment or other securities, and the individual, partnership or corporate house that has acquired a clientele and buys for re-sale to investors. In its every act and aspect, the business represents simply a varying number of transactions, each of which is an individual transaction and a matter of individual right. The issuance of securities, especially of stock, by a business corporation presents a different question with which we are not now concerned, athough the issuance of notes and bonds by a partnership and, we think, by a private corporation, is merely a borrowing

of money, also "a varying number of transactions each of which is an individual transaction and a matter of individual right."

1. "The issuing * * * of stocks or bonds by a private company to get money for its own business no one can suppose is a public or quasi-public enterprise; the business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries."

Per Curiam, in the Doyle Case, 210 Fed., 173, 179.

This is clearly the sound normal view of the normal business. Does the existence of "fly-by night" peddlers of oil and mining stocks change the normal character of this normal business?

Against the right to carry on this business the act in question is in principle, and to a large extent in fact, prohibitive.

"The object of a license is to confer a right that does not exist without a license; and, consequently, a power to license involves, in the exercise of it, a power to prohibit under pain of penalty without a license."

Chilvers *v.* People, 11 Mich., 43, p. 49.

The Court adding that

> "* * * The fact that a license is required to do an act is of itself a prohibition of such act without a license."

The professed aim of "blue-sky" legislation is to eliminate the "get-rich-quick" fakirs. The present act by its terms is directed against

the great normal business and the bulk of individual transactions involving the sale and re-sale of outstanding securities amounting to billions of dollars in amount. No effort whatever has been made to confine its operation to securities promising fabulous returns or sold by itinerant "fly-by-nights," or otherwise involving elements suggestive of fraud and danger. It includes the "get-rich-quick" promoter in the same way that an act directed against the purchase and sale of any wearing apparel would include the street peddler in paper collars. The exemptions from the act include certain investment securities, but they do not in any distinctive way exclude from the act the normal investment securities as such nor confine the operation of the act to peddlers of "get-rich-quick" securities as such. Its validity must be determined by its prohibition, not by its exemptions, unless it is clear that the prohibition is in fact confined to a class of transactions as to which it is constitutional. This is clearly not so. The normal business of appellees is included within its prohibition and is a business not properly subject to prohibition.

There has nowhere at any time been any suggestion of any wide-spread fraud in the sale or distribution of so-called investment securities. There are in fact many businesses where fraud is supposed to be more prevalent, including as instances horse trading and the automobile business. In practically every contractual transaction fraud is possible, and its prevention a proper subject for legislative action. If, upon a legislative assumption of the prevalence of fraud in any general business (as distinguished from a limited or special method of doing business) the entire business and

the right to carry it on may be made the subject of discretionary executive license, then no business can be judicially protected from the assertion of this power.

The subjection of certain business to executive license and control rests in many cases on usage and common assent running far back into the English law. There has never been any absolute individual right to engage in any of them. The modern trend of decisions is, we believe, toward a fuller protection of the public interests against the private interests asserting such right. These are the modern instances resting on ancient principle applied, it may be, to a wider field because of the more extended scope of modern business. The control of the village hackdriver has been applied to the transcontinental railroad, but there has been no change in the principle upon which it is founded.

Equally ancient and fundamental is the liberty of the individual to carry on his every-day transactions and "the right to follow any of the common occupations of life," subject only to "the law of the land." This liberty and right cannot be made the subject of an executive permit. It cannot be converted into a privilege subject to executive grant. This liberty and right are inherent in the individual—to put it strongly—so long as he is not in jail. Were the rule otherwise, could a man, for instance, deemed to be of ill repute be deprived of the right to follow an ordinary occupation, he would be in fact deprived of every occupation except fraud and crime. A convict who had served his term would be doomed for life to legal outlawry.

> "And a freeman may buy and sell at his pleasure. This right is not of society, but from

> *nature.* He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell or to make a bargain. The search would be vain."
>
> Arrowsmith *v.* Burlingim, 4 McLean, 489, 497.

The liberty of the individual, his right to engage in a vocation or calling as such, cannot be made the subject of executive control. The subjection to such control deprives him at once of his liberty and free use and disposition of his property. Even though the executive master may be a beneficent one, he is still a master and the individual has lost his liberty and the right to dispose of his property.

2. So far as we have been able to discover, no case has ever reached this Court where the power of executive license was asserted except against a business clearly subject to the power of prohibition. Many such cases have, however, been before the State Courts and the Acts held unconstitutional. Both the authority and reasoning of some of them are of value.

Under the Michigan Constitution as construed by the Supreme Court of the State, such an act is invalid.

In *People* v. *Berrien*, 124 Michigan, 664, the Court holding unconstitutional an Act requiring commission merchants *to obtain a license and give a bond*, said (666):

> "The business of buying and selling on commission has existed ever since commerce began. There are and always have been dishonest men engaged in it, as there are and always have been in every other branch of business. There are and always have

> been dishonest sellers, who will pack their produce in such a manner as to deceive. * * * There is no more reason why a commission merchant should pay a license fee, and execute a bond to pay his debts and to do his business honestly, than there is that any other merchant should pay a like fee, and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. * * * It is not like a liquor traffic, which under the decisions of every Court, is subject to the police power, because of the injury it does to the health, morals and peace of the community, and may be prohibited altogether. Neither is there anything in it requiring regulation, as do hack drivers, peddlers, keepers of pawnshops and the like."

In *People* v. *Warden*, 157 N. Y., 116, at page 123, Chief Judge Parker said:

> "The tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments are the result. *But usually in case of wrongs penalties have been provided.* It is novel legislation indeed that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it from whose conduct the people suffer."

In the recent case of *People* v. *Jenkins*, 202 N. Y., 53, holding unconstitutional an Act requiring a license of transient retail dealers selling in a store articles advertised as purchased at a bankrupt sale or as damaged by fire, emphasis is laid upon the distinction we make between restrictive laws and laws subjecting the individual to possible prohibition and executive control.

Chief Judge Cullen, at page 57, said:

"I concede that no vendor has a right to tell a falsehood as to his goods, be it material or immaterial, *and that the Legislature may properly pass laws to prevent or punish false statements.* The legislation before us does nothing of the kind. * * * *A vendor may own goods which have been purchased at a sale of a bankrupt or damaged by fire, and he has the unqualified right to sell them, and the unqualified right to tell the truth about them.* He cannot, under the exercise of the police power be prohibited from enjoying both these rights. 'The right to buy, sell, barter and exchange property is a necessary incident to its ownership, and subject to reasonable regulations is as much protected by this provision of the Constitution as is the ownership itself.' (*City of Carrollton* v. *Bazzette*, 159 Ill., 283.) * * *

"*the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting either directly or indirectly, the business* (*People ex rel. Tyroler* v. *Warden*, etc., 157 N. Y., 116; *Wright* v. *Hart*, 182 *id.*, 330).

"The counsel for the respondent relies largely on the authority of *People ex rel. Schwab* v. *Grant* (126 N. Y., 473), where it was held that to pursue the business of an auctioneer in the City and County of New York, a license was necessary, and that it was discretionary in the Mayor whether to grant or refuse a license. *It must be always remembered that law, even constitutional law, rests not wholly on principle, but in part on custom and tradition.* * * * Chief Judge Ruger, in the Schwab case, shows that during and ever since Colonial times, the calling of auctioneer had been regarded as a vocation *not open to all*, but subject to special license and authority" (italics ours).

See also *Chaddock* v. *Day*, 75 Mich., 527, holding unconstitutional an ordinance requiring a license for the sale of meat.

In *Lochner* v. *New York*, 198 U. S. 45, at p. 63, this Court cited with approval the State cases holding unconstitutional statutes regulating the trade of horseshoeing, including the case of *Bessette* v. *People*, 193 Ill., 334. In the latter case a distinction between a license fee for revenue and a license fee for regulation was clearly drawn. The Court said (p. 343):

> "Therefore, the proper construction of the act being that the license fee is imposed for regulation and not for revenue, the question arises whether the occupation of horseshoeing is such an occupation as the Legislature has any power to regulate in the manner provided for in this act."

After citing the case of *Powell* v. *Pennsylvania*, 127 U. S., 678, and *Allgeyer* v. *Louisiana*, 165 U. S., 578, the Illinois Supreme Court said (p. 345):

> "Although the power and discretion which the State Legislature has in the matter of promoting the general welfare, and of employing means to that end, are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty and property. And although the Legislature may determine when the exigency exists for the exercise of the police power, yet it is for the Courts to determine what are the subjects of the exercise of this power."

Two especially well considered cases dealing with the regulation of the nursery business, and holding that the right to engage in it may not be subjected to discretionary license or bond, are

ex parte Hawley, 22 S. D., 23, 15 L. R. A. N. S., 138, and *In re* Schechter, 63 Fed., 695.

3. It is urged that "the prevention of fraud" is within the police power of the State. No one would question this general dictum. The Courts have also said that the police power extends to the promotion of the general welfare, comfort and convenience of the public.

Whatever confusion there may be as to the use of the term "police power," it is not, we think, apt to mislead the actual decision of the Court in any given case. There has been some criticism as to the broad use of this term in cases dealing with railroads and matters outside of the essential public needs. The point of course is that railroads fall within the general power of the State over public highways and over utilities exercising the right of eminent domain. The police power as such, in a very special sense, has been used to cover only those "great public needs" represented by the "public peace, health, morals and safety". The term has also been more broadly used as synonymous with governmental power, notably in cases dealing with the incidental injury, "*damnum absque injuria*," flowing from public improvements. In the early law this doctrine seems not to have been rested on the police power, but in later cases it is so classified.

> *Gilman* v. *Philadelphia*, 3 Wall, 713, 729;
> *Hamilton* v. *Vicksburg*, 119 U. S., 280;
> *C. B. & Q. R. R.* v. *State of Illinois*, 200 U. S., 561.

In these and similar cases the term is practically synonymous with the powers of government.

Mr. Justice Harlan, in *Lake Shore, etc., R. R.* v. *Ohio*, 173 U. S., 285, 297, intimates that this Court prefers the broader use of the term. Dealing with and referring to railroad legislation he said:

> "It may be that such legislation is not within the 'police power' of the State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

It is plain from this *dictum* that the police power as so used is synonymous with governmental or legislative power as elsewhere used, and is not necessarily synonymous with the term as used in other cases dealing with the protection of the public peace, health and safety.

The use of the term in the different classes of cases by no means implies that legislation to promote the public convenience may authorize the executive to seize the person or property of the individual in the same way as is permitted to legislation relating to public health. Nor, we think, does it mean that legislation to prevent fraud in individual transactions of purchase and sale may take the form of subjecting the right to engage in such transactions to discretionary executive license, because the latter power is exercised over the milk business or over the banking business where fraud endangers the public health or destroys the safety which it is the special quasi-public function of a bank to pro-

vide for the imperative business needs of the community. No decision, we believe, can be cited in this or in any of the higher State courts, in support of such a view.

The power of prohibition against a particular commodity was asserted in *Powell* v. *Pennsylvania*, 127 U. S., 678, and the power of prohibition against a particular method of doing business was asserted in the recent case of *Rast* v. *Van Deman*, 250 U. S., 342.

In the former case the act was rested primarily on the protection of the public health, being entitled, "An Act for the protection of public health and to prevent adulteration of dairy products and fraud in the sale thereof." Mr. Justice Harlan, referring to the offer made in the Court below to prove that the particular articles sold by the defendant were wholesome, said (684):

> "It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The Court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. * * * Whether the manufacture of oleomargarine or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, * * * are questions of fact and of public policy which belong to the legislative department to determine."

We believe that in all the later so-called "oleomargarine" cases, the statutes have simply pro-

hibited the sale of oleomargarine colored to resemble butter.

Plumley *v.* Massachusetts, 155 U. S., 461.

In *Rast* v. *Van Deman,* the whole conflict on the question of the interference with the liberty of a citizen centered upon the argument that the trading-stamp business was simply a normal method of advertising. The decision was rested on the view expressed by Mr. Justice McKenna as follows (p. 365):

> "The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery'; may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the Legislature to make."

In the present case we are dealing with a prohibition not of a particular and novel method of doing business, a method conceivably pregnant with a special danger to the public, but with a prohibition of an entire business consisting primarily of a succession of normal individual transactions. The right is asserted, not to prohibit specific methods of carrying on this business nor of requiring specific safeguards against fraud, but of prohibiting the whole business, unless in the first instance the right to engage in it is granted

by an administrative officer or board upon its determination of the essentially administrative question as to the character of the individual.

Unless we start with the proposition that the right to sell securities owned by individuals as a business is not an inherent right, it is difficult to conceive of any other principle upon which such power may be upheld. The determination as to the character of the individual must be essentially an individual determination of the particular officer or board. It applies not alone against local dealers known in the community, but against dealers of other states and remote cities. Once such a question is held to be legally vested in an administrative officer, its exercise becomes potentially arbitrary beyond the power of real protection in the courts. We believe that to concede this point is to concede the power of complete control over a business which is essentially individual and competitive. Such a power once asserted and exercised is bound to destroy the normal interstate business in the sale of securities.

We repeat, therefore, that unless the power of complete prohibition exists, and unless the individual has no right to sell his property "in the course of continued or successive transactions of a similar nature," the Legislature cannot make the exercise of this right subject to the determination of an administrative officer or board.

4. There have been many attempted classifications of businesses "affected with a public interest" and subject to executive control.

Freund on Police Power says (Sec. 373):

> "Omitting those kinds of business which are subject to a special control in the interest of

peace, safety, health and morals, and which involve only the police power in the narrower sense of the term, the following have been classed from time to time as in a special sense public occupations or classes of business; at common law, the business of the carrier, innkeeper, ferryman, wharfinger, miller; the character (sic) is frequently indicated by the term public or common carrier, etc.; by modern statutes, and in addition to the common law, the business of railroads and the telegraph and telephone; also the management of turnpikes and canals; storage of grain and tobacco and the business of stock-yards; the supply of water, gas, light, heat, and power, through pipes and wires; banking and insurance; under recent judicial decisions also the gathering and distribution of news and market quotations."

Both the text-writers and the Courts have said that one class of business was subject to one kind of regulation, and another to another kind. This is of course true. The basis upon which the right of control rests is different in different classes of business, and the control asserted in the first instance is directed to one or more particular evils. Leaving aside, however, some of the smaller and exceptional classes of business and local nuisances subject to municipal regulation, and dealing with the important businesses which have been held subject to discretionary administrative control, such as the railroads, banks, insurance, and liquor business, it is, we believe, now true:

First. That they are subject to complete power of prohibition against the individual.

Second. That they may be confined to corporations.

Third. That they may be taken over and operated by state.

It is also true and important to note that each of them are susceptible to administrative control, and if necessary of complete ownership and operation by the State.

The prohibition in the present act against the business of buying and selling securities, is, we think, in principle that which has been asserted against the important business mentioned. The scheme of the present Act is similar in effect to that of an act prohibiting the business to the individual and requiring it to be done under corporate charter subject to conditions prescribed including subjection to executive control.

It is of value to quote in this connection from "Say's Political Economy, note to p. 134," as quoted in the opinion of the Court in Beebe *v.* State, 6 Ind., 505:

> "A government is guilty of an invasion upon the faculties of industry possessed by individuals, when it appropriates to itself a particular branch of industry * * * or when it sells the exclusive privilege of conducting it."

We have dealt with the licensing of the business on the assumption that its purpose is the prevention of fraud as a "great public need." The further "public need" of preventing loss through speculation becomes evident when we study the act in more detail under Point III.

(5.) The business of dealing in the stocks and bonds of corporations is not one "clothed with a public interest," and, therefore, subject "to be controlled by the public for the common good," within the principle laid down in *German Alli-*

ance Insurance Co. v. *Lewis,* 233 U. S., 389, and the cases upon which it was decided. In holding as this court did in that case, the business of insurance to be of such a character as to justify the State in fixing the rates and charges which might be made for services rendered by the business of fire insurance companies, the court pointed out that the decisions in *Munn* v. *Illinois,* 94 U. S., 113; Budd *v.* New York, 143 U. S., 517, and *Brass* v. *Stoeser,* 153 U. S., 391,

> "demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation" (p. 411).

and cited with approval the language of Judge Andrews in *People* v. *Budd,* 117 N. Y., 1, 27:

> "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."

The court then analyzed the business of insurance to determine whether or not it was within this principle. It adverted to the fact that from as early a period as 1837 the State has stepped in and imposed conditions upon insurance companies restraining the absolute liberty which businesses strictly private are permitted to exercise.

Now, the facts submitted in the present case show that there is no mature universal sense of the people regarding the regulation of the sales of stocks and bonds. The entire history of the leg-

islation began in Kansas in the year 1909. In five years it extended itself. It ran rapidly like a brush fire, and is not saved by any continued persistence "from the charge of unconsidered impulse." So far from having the characteristics of that universally widespread public belief which has found expression for nearly a century in the regulation of the business of insurance, it is shown to be sporadic, ill-considered and adventitious. It flared up suddenly under popular agitation and has died down as rapidly. An equally widespread clamor easily might be cultivated regarding the management of department stores, or of any of the other manifold activities of business life which the constitution and free institutions protect from the meddlesome interference of governmental bureaucracy. The reasoning of Judge F. C. Munger in holding a statute of Nebraska undertaking to fix the maximum rates and premiums that any fidelity or insurance company transacting business in that State might charge for furnishing bonds and undertakings is applicable here. See *American Surety Co.* v. *Shallenberger*, 183 Fed., 636. He there said (639):

> "The public interest in the business of such companies is no different in kind, from its interest in the business of any large mercantile or manufacturing company, whose capital, experience, and facilities may enable it to have widely extended patronage, but such characteristics do not make the business one which is affected with a public interest." Citing (*State* v. *Associated Press*, 159 Mo., 410.)
>
> "If the state may fix the amount of compensation for which an insurer may lawfully contract for furnishing such insurance, the state may dictate the price for which all other

> commodities shall be sold, including the price which may be paid for labor. This cannot be done. The fourteenth amendment to the Constitution protects the right of those engaged in purely private business to fix the price at which they will sell their services or commodities." (Citing Chesapeake & Potomac Tel. Co., 186 U. S., 238-246.)

The business of furnishing surety bonds is not a business of insurance within the general meaning of fire, life and marine insurance. True, in a certain sense surety bonds are contracts for indemnity against loss; but the obligation of the surety upon the bond is a guaranty for the personal performance of an assumed obligation. The obligation of the underwriter of a policy of life or fire insurance is an agreement of indemnity against impersonal loss, that is, loss caused by disaster for which no individual may be responsible; against the contingency of accident or death. The business of furnishing corporate suretyship in lieu of individual guarantors is of recent growth, and has no such record of long-continued public regulation as to "exhibit it to be the conception of the law-making bodies of the country without exception that the business of (that kind of) insurance so far affects the public welfare as to invoke and require governmental regulation" (233 U. S., 412).

Judge Pollock, in writing the decision of the lower court in *German Alliance Insurance Co.* v. *Barnes*, 189 Fed., 769, 778, cited, in support of the proposition that the business of fire insurance, although in its nature a private business, was affected with a public interest, quoted from the opinion of Mr. Justice Harlan in *German Alliance Insurance Co.* v. *Hale*, 219 U. S., 307, wherein was involved the constitutional validity of an act of the State of

Alabama, which provided for the recovery by the assured from the company of 25% more than the actual loss sustained, on a mere showing that the company writing the contract belonged to the Insurance Tariff or Rate Association, wherein he said:

> "We concur entirely in the opinion expressed by the state court that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any rights granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly * * *" (p. 316).

And he held that the principle underlying the enactment in that case and the case then before the court was the same.

Counsel for the State of Kansas in the *German Alliance Insurance Co.* case, after a review of the history of governmental regulation of fire insurance business and the scope of the statutes enacted in pursuance of such regulation, argued in the Supreme Court that said enactments

> "are conceded to be within the power of the state, not alone because these companies are corporations, but because they are engaged in the business which affects the public at large on account of its magnitude and on account of the fact that it is so centralized, within the control of certain large corporations the management of whose business is so intricate that the average private citizen in dealing with them is placed entirely at a disadvantage, and which makes it easy for the companies themselves by private agreement to entirely and arbitrarily regulate and control affairs which are of great importance to every citizen in this state" (Brief, p, 9).

This argument was also employed by Justice McKenna in delivering the opinion of the Court (233 U. S., 414-416).

Such facts have no application to the case at bar. There is no centralized control over the business of selling securities and no state of affairs which makes it easy "for the companies themselves by private agreement to entirely and arbitrarily regulate and control affairs which are of great importance to every citizen in the State." There is nothing respecting the business of buying and selling securities substantially different from other kinds of commercial business. There are of course opportunities for fraud in this, as in every business. There is the temptation of cupidity on the side of both the purchaser and seller, and the same contingencies of gain or loss, anl unless we are to substitute the paternal government of the Socialists for the Constitutional liberty of our ancestors, such statutes as the Blue Sky Legislation of Michigan, Ohio, and other States, of similar character must fail.

POINT III.

One who "in the course of continued or successive transactions of a similar nature" offers or sells securities owned by him, cannot be prohibited from making a particular offering or sale except upon a "certificate of authority" from a State Commission.

1. For the purposes of this appeal, these appellees are not inclined to stress any particular construction of Section 9. The purpose both of the 1913 and 1915 Act, as of the 1911 Kansas Act, is to reach something less definite and more broad than provable fraud.

It is evident from the careful wording of the act, and from its repetition, that its prohibition is intended to apply even though the act might not be found in fact fraudulent—fraud requires intent and a *finding* requires evidence to support it. The transaction is prohibited if its effect would be *to work a fraud in the opinion of the administrative board.* The most limited sense that can be given to this clause seems to us to be, that, even though a fraudulent intent cannot justly be ascribed to the promoters, yet if in the opinion of the Commission he has deceived himself and is deceiving others as to the merits and prospects of his scheme, which is in its opinion unsafe and will probably prove disastrous, then it would in its opinion "work a fraud on the purchaser," deceive him and cause him loss. This deception and this loss, though unintended, the Act plans to prevent by its prohibition based on the disapproval of the Commission.

This idea is the crux of the Act, its purpose be-

ing to prevent something more than provable fraud.

Such was the purpose of the original Kansas Act and it survives in this Act. The investor is to be protected against his own gullibility, against the wiles of a John Law or Harley; against the visionary hopes of a Stephenson, Fulton, Morse, Bell, Whitney, Ford, Marconi, Holland or Wright.

The genius and enterprise of the future is, if possible, to be tied to the wheel of a government bureaucracy in each of the fifty States. This bureaucracy must have a depth of insight and expert knowledge sufficient to detect the latent fraud by which, as the Attorney General of Iowa has said, the "well-informed business man" is often deceived. If it fails, it gives to the fraud the sanction of the State and entails more loss to the very class sought to be protected, the class ignorant enough to rely on its protection, than it can possibly prevent by its restriction. This bureaucracy must on the other hand have a breadth of vision and expert knowledge sufficient to see the untold wealth pregnant in a new invention. If it fails, if it finds that the sale of securities based on a vision of promised value would work a fraud on the gullible purchaser, if it refuses under Section 8 to sanction the issue of $100,000 in stock for an invention worth in fact $100,000,000, the vision and the invention may die aborning.

Need we ask the Court to take judicial notice of the fact that this superhuman perfection, this deep insight, broad vision and expert knowledge covering all the fields of human endeavor, does not ordinarily reside in the Bank Superintendent or the State Treasurer or even in the Attorney Gen-

eral of any of the several sovereign states of the American Union?

Is it not clear, that when by the publicity feature of the acts, we have driven away the obvious frauds, the act, Section 9, becomes in its necessary effect an evil incalculably greater than any other evil remaining to be remedied?

Birth-control cannot be substituted for the demonstrated events of life.

Consider for a moment the variety of enterprises upon which the Commission must pass—a commercial business in Michigan, a railroad in China, a gas or power utility in California, a timber enterprise in Panama or British Columbia, an asphalt property in South America, and an invention to revolutionize the automobile industry.

As to none of these in fact does the state undertake to supply an expert judgment. It desires to substitute for the judgment of a poor widow or uninformed farmer the judgment of a lay political official or employee. But if it decides that the proposed sale to such an investor would work a fraud on him, its prohibition prevents the most wide-a-wake business man from purchasing securities in the full exercise of his own judgment. If having in mind the wide-a-wake business man, it applies the act liberally, it opens the door to greater loss to the poor investor.

The purpose is to protect a minority of "investors," looking for vast gains, against a danger existing in a small minority of transactions. To accomplish this it prohibits all investors from buying securities without the approval of the Commission.

2. *The law is primarily prohibitive.* It prohibits the act absolutely in the first instance, and then authorizes an application to the Commission for authority to do it.

It does not prohibit particular wrongs, but it prohibits an entire business and each of a multiplicity of transactions connected with it, unless (1) the business and (2) each of such transactions is officially approved and permitted.

We have mentioned the fact that businesses such as those of railroad and banking may be denied to the individual and limited to corporations chartered by the state, doing business as conditioned in their charters. In practical effect that is what is here done. The transaction is (1) prohibited and (2) permitted in a special way under the license and control of a State Board.

The law (except the final provision in section 3, *infra*) does not authorize an investigation of particular cases and a finding by the Commission of the fact or conclusion of fraud or deception, and then prohibit only the thing found to be fraudulent. It prohibits a hundred transactions, because, one of them may be fraudulent, and compels the ninty-nine innocent parties to get a permit and pay a fee, and to establish their honesty and the sound basis of their proposition before they can sell a share of stock.

This prohibition is in fact final as to a very large proportion of the transactions covered by it, including the normal business involved in the sale of one to ten or twenty bonds to a particular investor. It in actual effect confines offerings to a few flotations having a profit to the promoter or dealer sufficient to justify the burden and expense imposed.

Where not completely prohibitive in the first instance, it will become completely prohibitive as to any normal offering of investment securities the moment the Commission exercises its uncontrolled discretion of conducting an extended investigation of the property and business at the expense of the applicant. Argument and instances are hardly necessary to support this statement. A normal offering of investment securities would not stand this unlimited expense in one state, let alone in the four to twenty in which otherwise it would be made. This power is practically uncontrolled.

3. Legal Character of Control. The power given to the Commission is in form that of determining the character of particular transactions, first, to "find" that it is "fraudulent;" second, to "find" that in its own "opinion" it would 'work a fraud" on the purchaser.

The power given to the Commission is in substance that of complete governmental control, (1) over the prevention of fraud in the issuance or sale of securities, with a duty to prevent fraud and (2) over the prevention of loss through mistakes as to fact in the purchase of securities with a duty to prevent loss.

It is the substance, rather than the form, which concerns us on this appeal.

Dealing with the form in which the Act presents the question, the invalid feature of the Act is the initial prohibition. If this were valid, if all transactions might be prohibited, there could be no objection to the grant of permission upon the finding of an administrative board as to a particular transaction. Such a power, within its

proper field, is administrative in character, though both quasi-judicial and quasi-legislative in its operation and effect.

It cannot be said that the powers given the Commission are *in form* legislative. The Legislature may issue licenses and grant charters of authority, but it can also authorize an executive to do it. In either case, there is no occasion for a license or authority unless either (1) the thing granted is something in its nature beyond individual right, or (2) can be properly denied to individuals and converted into a privilege to be granted by the State.

Nor are these powers *in form* necessarily judicial. There is no legal adjudication of particular right or wrongs, simply a determination of judgment in the exercise of discretion, as a basis for prohibiting or permitting a thing to be done.

Dealing with the substance, we have a delegation of complete power, including the legislative and the judicial, over an entire field of governmental action, a field of ordinary legislation, a field in which it is the essential function of the Legislature to declare the law, and of the Courts to adjudicate particular rights and wrongs under it.

The question comes back finally to one of prohibition. If the act may be prohibited, it may be made a matter of administrative license; if it may not be prohibited, it may not be made a matter of license.

We repeat that the thing prohibited is not fraud. It is the transaction. It is made a matter of license, instead of a matter of right without a license. A whole field of ordinary legislation is abandoned to the actual government and con-

trol of an administrative commission. This field is the prevention of fraud or improvidence in the sale or purchase of securities.

4. The prohibition of the right to buy and sell, its conversion into a privilege subject to executive permit, deprives the person both of liberty and property without due process of law. It is not within the Police Power.

> "The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have the right to sell or barter, and this right is protected by the constitution as such an incident to ownership. When an owner is deprived of the right to expose for sale and sell his property he is deprived of property."
>
> *Chicago* v. *Netcher*, 183 Ill., 104, 110.

See also:

> *State* v. *Indiana Oil Co.*, 120 Ind., 575, 583.

> "The legislature may properly pass laws to prevent or punish false statements. The legislation before us does nothing of the kind * * * A vendor may own goods which have been purchased at a sale of a bankrupt or damaged by fire, and he has the unqualified right to sell them, and the unqualified right to tell the truth about them * * * the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting, either directly or indirectly its business."
>
> Chief Judge Cullen in *People* v. *Jenkins*, 202 N. Y., 53, at p. 57.

Much that has been said under Point II with reference to the prohibition of the business applies with even greater force to the prohibition of the individual transaction.

The fact that the police power may permit the destruction of a building endangering public safety, or the seizure of an infected individual or an infected cow endangering public health, does not mean that it permits the confiscation of the right to sell property because, in the opinion of the executive board, its purchase would work a fraud on one or more possible individual purchasers.

The fact that the State which creates a railroad, may by executive act fix or limit its rate of charge, does not mean that it may by like act condition or control the right of bargain and sale.

"The police power extends to the great public needs." (Mr. Justice Holmes in the Oklahoma Bank case.)

"But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution" (Mr. Justice McKenna in Eubank *v.* Richmond, 226 U. S., 137).

What is the great public need on which this legislation is founded? The evil which it is the purpose of the present act to remedy is stated in the appellant's brief to lie in the sale of "fraudulent mining stocks, oil stocks and other fly-by-night ventures."

We have seen that the so-called "fly-by-night," or "get-rich-quick," or "blue-sky" dealings do not constitute more than one per cent. at the outside of the total dealings in securities. We have seen that as to the normal business there has been no

charge that fraud is prevalent in the distribution of securities.

It is also to be emphasized that this so-called dangerous class of securities is fairly well earmarked and could at least approximately be defined and reached by legislation requiring adequate safeguards against its special dangers.

It is said that the supervision of banks rests on the need of preventing fraud and loss to the community, and that therefore the prevention of fraud as such justifies executive control. The answer is plain. The savings of a whole community are in the bank or banks of the community. The bank invites its depositors to create a common fund and itself performs a quasi-public service to the community in receiving deposits subject to check, as well as in caring for and investing the savings of the community. Fraud or waste in the management of the bank involves not only a loss but may well involve a community bankruptcy or a national panic.

It might be argued that in rare instances fraudulent flotations have been so widely distributed that the losses have fallen on a whole community. Yet, in fact, even in the extreme cases, this is never so. The investments are essentially individual, and the fraud, if practiced, is individual. The losses sustained by fraud, as distinguished from losses due to wide-spread depressions and panics, are individual. The evil in its essence is simply an important one of the many individual wrongs which should be the subject of effective remedial legislation.

The following dictum of Mr. Justice Wheeler, sitting in Special Term of the Supreme Court of New York, is apt:

> "The statute is not addressed to the punishment of fraud where actually committed, but is rather a prohibition against certain acts for fear fraud may be perpetrated. *The legislature might with equal propriety and upon the same argument pass an act prohibiting certain persons trading within the state in order that they might not possibly perpetrate frauds upon those with whom they deal.* * * * It is not legitimate legislation to prohibit the prosecution of a lawful business or calling because some unscrupulous person may in connection with it perpetrate a fraud. The thing to do is to prohibit and punish the fraud—not the business."
>
> People *v.* Vandell, 146 N. Y. Supp., 992, 994.

What we have said applies to fraud as a basis of a public need within the field where it prevails. This was the great public need visioned by Mr. Dolley in his original "blue-sky" agitation. Close upon it followed the purely bureaucratic idea of giving "valuable advice" to the public, to be "of much assistance to them in investing money where it will not be lost." A year later it had come to pass that "the law is rapidly gaining fame all over the civilized world. I believe that a movement has been started that will eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated by law."

Here is a new public need. Is it in the opinion of this Court a "great public need"?

The following quotations are taken from Dr. William Bondy's excellent discussion entitled "The Separation of Governmental Powers," published by Columbia College in 1896.

MONTESQUIEU:

"When the legislative and executive powers are united in the same person or body, there can be no liberty." (p. 13, 14.)

WASHINGTON:

"The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism."

MADISON:

"The accumulation of all powers, legislative, executive and judicial in the same hands, may justly be pronounced the very definition of tyranny."

JEFFERSON:

"The concentrating these in the same hands is precisely the definition of despotic government."

ADAMS:

"It is by balancing each of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved."

HAMILTON:

"I agree that there is no liberty if the power of judging be not separated from the legislative and executive powers." (p. 17.)

WEBSTER:

"* * * doubtless the continuance of regulated liberty depends on maintaining these boundaries." (p. 18.)

BLACKSTONE:

"Were it (the judicial power) joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated only by their *opinions, and not by any fundamental principles of law*, which though legislators may depart from, yet judges are bound to observe." (p. 14; italics ours.)

5. The scheme of the Act is attempted to be upheld on the principle that the "Legislature can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." To deny this would be to stop the wheels of government" (Locke's Appeal, 72 Penn., 491, 498). But see

Willoughby on the Constitution, Section 776.

Cooley, Constitutional Lim., 7th Ed., page 163.

To the objection "made in the Court below that no fixed standard for the guidance of the Commission was found in the law" our adversary exclaims (Appellants' Brief, p. 25):

> "How absolutely impossible such a thing would be must be apparent, and how readily the law could be evaded if a fixed standard was present in the Act goes without saying."

The same comment would hold if the same principle were applied to any other field of legislation.

Let the Legislature prohibit any and all schemes, transactions, or parts thereof, which in the opinion of the Governor would tend to defraud or to cause improvidence or loss, or to encourage gambling or immorality. Then upon the determination of the Governor that a particular act or thing being done or contemplated by John Jones to or with Tom Smith or Mary Brown was within one or another of the things mentioned, let him

sign a finding and send it to John Jones, thereby prohibiting him, *i. e.*, John Jones, from doing that particular thing.

Can it be said that the law-making power is vested in the Governor? Perish the thought! He simply "determines some fact or state of things upon which the law makes or intends to make its own action depend." To deny this would be to stop the wheels of government."

So far as lies within our power on this appeal, we profess a desire to "stop the wheels of government" at or about this point. They have as yet gone not too far, nor perhaps far enough, but if they ever attempt to go by administrative process over individual transactions and private business, they will, we think, have ceased to be "the wheels of government" and become the hoofs of an autocrat.

We have already pointed out what seems to us to be the potentially complete character of administrative control over quasi-public businesses and matters of public right. The tendency of modern decisions is, we believe, to re-assert, rather than to create, the full power necessary to their effective control, and to recognize the fact that control of one of its interrelated parts means, in the last analysis, the power of complete control.

There are also, of course, other subjects of prohibition and administrative control, distinct from any business, such as the control over the use of streets and public places, and the far-reaching control necessary at times for the protection of the public health, peace and safety, to which may be added the control over foreign commerce and over aliens which has been vested in the President, and the control given various officials or boards over

governmental agencies, such as the post office, and governmental property, including public parks and reservations.

It is, we think, indisputable, that as to each and all of these businesses and subjects, the control vested in the administrator rests solely on the original principle or necessity on which it was first asserted, that it is historically and constitutionally an administrative power, the vesting and conditions of which are subject to law, that is to legislative grant and control.

Such control not being legislative in its nature, an act vesting it in an administrator is in no sense a delegation of legislative power. Manifestly the Legislature may grant or withhold it, limit or condition it as it sees fit, and by the very nature of the case may, if it chooses, prescribe by law the details, the standards or the rules, to be followed by the Administrator.

Whether the whole matter be vested in the Administrator, or prescribed by the Legislature, the act of each is an act of the State, and is subject to the constitutional inhibitions against the impairment of contracts or the deprivation of property rights. There is no liberty, no liberty that is to engage in the railroad business, the banking business, the insurance business or the liquor business.

The question in each case is one of the exercise of the power within the constitutional inhibitions and, if by the Administrator, within the statute governing it, and in no way a question of the delegation by the Legislature of its essentially legislative power.

In the great majority of the cases dealing with this power, notably *Liebermann* v. *Van de Carr*, *Gundling* v. *Chicago*, *Engel* v. *O'Malley*, and the

German Alliance Insurance case, no question seems to have been raised as to the delegation of power. In a few cases, however, involving the same administrative control of a quasi-public business or of other matters clearly subject to such control, counsel, and at times Courts, have given weight to the argument that such control vested in the Executive was in some way touched by the constitutional rule or express prohibition against the delegation of legislative power, and have formulated principles relative to the delegation of legislative power, which, whatever bearing they may have in such cases, have, we submit, none in cases of ordinary remedial legislation.

In fact, it seems to be in precisely, if not exclusively, in such cases that there have been established what are quite generally recognized as the priinciples governing the delegation of legislative power.

Locke's Appeal, 72 Pa., 491.

in which the question was as to the licensing of saloons, a local option law.

Field v. *Clark*, 143 U. S., 649,

in which the question was as to the vesting in the President of the right to suspend a reciprocal tariff provision.

Buttfield v. *Stranahan*, 192 U. S., 470.

in which the question was as to vesting the Secretary of the Treasury, acting on the recommendation of an expert board, with power to fix a standard of purity for imported teas.

Union Bridge Co. v. *U. S.*, 204 U. S., 364,

in which the question was as to vesting the Secretary of War with power to cause the removal of a bridge as an unsafe obstruction to a navigable stream, *i. e.*, a public highway.

U. S. v. *Grimaud*, 220 U. S., 506,

in which the question was as to the construction of the power given the Secretary of Agriculture over a government reservation, and the validity of a regulation prohibiting sheep raising within a prescribed area.

I. C. C. v. *Goodrich Transit Co.*, 224 U. S., 194,

in which the question was as to the construction of the power given the Interstate Commerce Commission to require accounts of common carriers to be kept in a specified manner.

These cases sufficiently emphasize the point that in all instances where an actual discretionary power, or even the power to "determine some fact or state of things on which the law makes or intends to make, its own action depend," has been upheld, the Court has been dealing with a power historically and constitutionally administrative. This power is in nature a discretionary power. Instance the early statutes cited in *Field* v. *Clark* (pp. 683 to 692). Its rules and orders in the given field have all the force of law and are the law operating through a valid executive discretion upon the subject matter to which they relate.

Congress has the power to regulate commerce, but it is a power which must be exercised according to the character of the subject, and construed according to preexisting principles and

precedents applicable to the subject. These principles and precedents make it clear that the common carrier of commerce and the highways of commerce are to be controlled by an administrative officer or Board under laws to be adopted for that purpose. There is, we believe, no delegation of legislative power in vesting in such an officer or Board the broad discretionary powers historically and constitutionally proper for the purpose in view.

A law providing in terms that every interstate carrier should be licensed by the Interstate Commerce Commission and be subject in all respect to the conditions prescribed in such license, would, we assume, be free from constitutional objection.

A comparison of the *Yick Wo* case with the cases of *Lieberman* v. *Van De Carr* and *Engel* v. *O'Malley*, will, we think, bring out quite clearly the fact that this Court has concluded that the control vested in such cases may be discretionary in terms and is not affected by the principle of the delegation of legislative power. In the *Yick Wo* case Mr. Justice Matthews refused to accept the view of the Supreme Court of California that the ordinance then in question gave executive discretion "to be exercised with reference to the circumstances of the case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation * * * they * * * confer a naked and arbitrary power * * * not only as to place, but as to persons." The Court also cited the case of *Baltimore* v. *Radecke*, 49 Maryland, 217, in which a similar view was taken of an ordinance under which the Mayor was authorized in general terms to revoke permits for the use of steam engines. Mr. Justice Matthews

instanced as proper legislation "that giving discretion * * * to grant or withhold licenses for taverns * * * one of the conditions is that the applicant shall be a fit person," emphasizing the need of some legislative guide or standard. In the *Gundling* case, the condition instanced by Mr. Justice Matthews was met, as the executive was required to be satisfied as to the good character of the person seeking the permit dealing in securities. In *Lieberman* v. *Van De Carr*, however, the Court entirely discarded the idea that the power delegated must be accompanied by any standard. Numerous cases were cited and the principle was unmistakably announced that the discretion given might be general and unqualified in terms. The same principle was applied with equal force in *Engel* v. *O'Malley*, to the business of banking.

Field v. *Clark*, and the various statutes cited in it (pp. 683 to 692) seem to us to rest chiefly and with unquestioned soundness on the necessity at times of vesting in the executive the complete power to deal with anything that affects our foreign affairs, to lay an embargo on foreign ships, to make or unmake restrictions applicable to our foreign commerce with all or with one nation, and to cite the most recent instance, to refuse clearance to vessels discriminating against American exports.

It is both interesting and pertinent to note that Mr. Justice Harlan emphasized the fact that "nothing involving the expediency or the just operation of such legislation was left to the determination of the President," and yet in the early statutes cited with apparent approval, practically uncontrolled discretion was given to

the President, necessarily, wisely and constitutionally. Though no historic review of the subject is at hand, it will hardly be questioned that here also we are dealing with a power which from time immemorial had been accustomed to be vested in the chief executive.

The same considerations apply with equal force to the cases upholding the exercise of executive power in the exclusion of aliens.

Fong Yue Ting v. *U. S.*, 149 U. S., 698.

A case close in character, but perhaps having an additional ground of support, is that of *Buttfield* v. *Stranahan*, 192 U. S., 470, upholding the Act of March 2, 1897, authorizing the Secretary of Treasury, upon the advice of an expert board, to prescribe standards of purity of teas imported into the United States. Can anyone question that if Congress is to legislate to safeguard foreign commerce in the interest of the public health, it must use the same executive expert instrumentalities which are available to a village board? In all these cases, though we think and speak of a delegation of legislative power, it is a vesting of administrative power not within or intended to be within either the letter or spirit of the constitutional rule of prohibition against the delegation of such power. We are dealing with matters properly within administrative control, and the reasoning and dicta by which the acts are upheld, have no relation to the questions of whether or not there is in fact a delegation in cases within the constitutional rule.

So, also, in *Union Bridge Co.* v. *U. S.*, *supra*, upholding Section 18 of the River and Harbor Act of 1899 (see opinion, page 386), the power to keep

open the navigable streams of a nation is no different in character from the power to remove obstructions in any public highway. It is a public duty that demands the exercise of administrative control that from time immemorial has been so exercised.

A decision somewhat out of the beaten track is that of *Public Clearing House* v. *Coyne,* 194 U. S., 497, in which this Court, Justice Peckham dissenting, upheld Section 3929 of the Revised Statutes authorizing the Postmaster General "upon evidence satisfactory to him," to exclude letters in aid of a lottery or fraud from the mails. The Court, page 506, by Mr. Justice Brown, pointed out that the transmission of letters had in times past been by private parties, and that the postal service

> "is not however a necessary part of the civil government in the same sense in which the protection of life, liberty and property, the defense of the government against insurrection and foreign invasion and the administration of public justice are; but it is a public function assumed and established by Congress for the general welfare and in most countries its expenses are paid solely by the persons making use of its facilities. * * * The legislative body in thus establishing a postal service may annex such conditions to it as it chooses."

In the alien cases, particularly in

> Ekiu *v.* U. S., 142 U. S., 65, citing U. S. *v.* Jung Ah Lung, 124 U. S., 621.

the Court made it clear that though the Legislature had provided for a hearing by the Courts to determine the facts, yet "on the other hand the

determination of those facts may be intrusted by Congress to the executive," with the power to exclude or deport the alien.

There are also many cases upholding the vesting of administrative power over matters essential to public health or safety, including the erection and removal of buildings, or affecting the use of the streets or public places. It is hardly necessary to discuss these cases, as they have been generally recognized, at least by this Court, as raising no question as to the delegation of legislative power.

There can be no delegation of a Legislative power unless the power is *essentially* Legislative. If the power in its nature is administrative, it is vested in the administrator by the Legislature, not delegated by the Legislature to the administrator; and this entirely irrespective of the fact that the Legislature as the law-making body might itself use its own judgment, determine the fact and apply the law. We are speaking of the discretion which may be given an administrator over public business, over foreign commerce, over Government lands and similar subjects. This discretion is not essentially legislative. It is not delegated but vested in the administrator; and this irrespective of the fact that the Legislature as the supreme law-making power might itself exercise all or part of the discretion and leave little or none of it to the administrator.

It is necessary to the efficiency of this control as applied in the large field subject to it, that it be liberally construed and potentially complete, leaving it to the Legislature to determine its bounds and conditions, to the Courts to keep it within the

bounds set by the Legislature and also within the bounds set by the constitutional inhibitions against the deprivation of property and the impairment of contracts.

This broad power cannot exist, it cannot be judicially recognized as it has been recognized, if the principle and precedents on which it rests are to be held applicable to the entire field of remedial legislation.

Locke's Appeal, 72 Pa., 491, the source of the oft-quoted dictum, illustrates very strikingly the inherent difficulties with which the Courts have had to contend. The majority opinion by Justice Agnew, one of the ablest jurists of a great bench, attempts with dubious success to distinguish and escape from the logic of Justice Bell's opinion in *Parker* v. *Commonwealth*, 6 Barr, 507, and Justice Sharswood replies to him from the bench with unanswerable force, making clear our present contention that the principle then announced as a general rule could never in any event be applied to matters of ordinary legislation (508).

> "There are a good many acts of executive administration which they can delegate to the Courts, or to the municipal corporations, or to the people of the different districts. But a 'law,' properly speaking, is a rule of conduct prescribed by the supreme power of the State, commanding what is right and prohibiting what is wrong.
>
> "*Now I think no one would doubt, if the legislature were to submit to the people of a county, or township, or ward, the question whether murder should be punished by imprisonment only, and let the people vote 'capital punishment' or 'no capital punishment,' that would be a law, and the legislature could not delegate it to the people.*"

On the premises assumed by Justice Agnew, he could not meet the logic of Justice Bell and was entirely refuted by Justice Sharswood. The weight of opinion now makes the question of "license" or "no license" one "of executive administration" which, as Justice Sharswood said, "they can delegate to the Courts or to the municipal corporations, or to the people of the different districts." That indeed was the ground first and soundly stated by Justice Agnew, when he said page 498, "what is the difference, in essence, whether the necessity for places for the sale of liquors be determined by the people or by the Courts." It was a local administrative question upon which it was proper for the Legislature to require the sense of the electorate. There was no delegation of legislative power, but only a submission to the electors of a matter of local policy.

Chief Justice Read also dissented in an able opinion. He took occasion also to refer to the proposed "centennial celebration to which we have invited the whole country," page 507:

> "On the 4th of July, 1776, every patriot drank to the independence of the thirteen states; shall it be that on the 4th of July, 1876, all we can lawfully offer to our guests on this great anniversary, will be a glass of Schuykill water, seasoned with a lump of Knickerbocker ice?

POINT IV.

The so-called standard manual feature of the act is unconstitutional and void.

It is evident that the Act with its sweeping prohibitions over an entire business would never have been adopted, or if adopted enforced, but for the subterfuge of the so-called manual exemption. The character of these manuals we have already discussed. It should, perhaps, be further stated that the really standard manuals such as Moody's and Poor's do not in fact "list" securities. They list the various corporations and publish various information as to each of them, including the amounts of securities issued.

The exemption intended to be effected is not merely an exemption of the securities of existing companies "listed" in the existing manuals established and used by financial houses. It is intended to cover, and does cover, securities hereafter listed in any manual hereafter approved by the Commission. *It is to be a permanent means of exempting new securities from the Act.*

The Commission is given a sweeping power to exempt securities in bulk; this regardless of any criterion whatever, unless the word "standard" is held to impose some indefinite limitation upon the manuals to be approved.

The approval by the Commission of a standard manual of information carries with it to the publishers of the manual the power to list additional securities, and by such listing to grant exemption from the Act. Different manuals are published at different periods and are, we believe, supplemented from time to time and *kept up to date.*

The affidavit of appellants (Record, p. 97)

states the character of the manuals which the Commission have approved, and that such manuals are standard manuals and "are such manuals as are in use by the bankers and investment public of the State of Michigan." This may be accepted as evidence of what they have done under the Act, but it does not have anything to do with the question as to the actual power given them. It is expressly charged in the complaint (Record, p. 11) that one of the manuals approved supplies "information as to failing concerns and as to fraudulent securities as matters of information to their clients." There is nothing in the Act inconsistent with the approval of such a manual.

It need, we think, hardly be argued that this power of sweeping exemption from the Act is left to the practically uncontrolled discretion of the Commission. It constitutes a complete delegation of legislative power to the Commission and also deprives appellees owning securities not listed in the approved manuals of the equal protection of the laws. There is no basis whatever for the classification except the assumption, contrary to the fact, that fraudulent or "get-rich-quick" securities would not in any event be listed in a manual approved by the Commission.

It should also be noted that the listing in the manual carries with it not only exemption from the need of securing an executive permit, but also that it carries with it absolute and complete exemption from the prohibition of Section 8 against the sales of securities issued for property in excess of its value. Many such securities are of course listed in these manuals.

2. The *proviso* to this exemption presents a separate and important constitutional question.

Bearing in mind that the vast majority of securities which would otherwise be within the primary prohibition of the Act are in fact listed in the manuals, it follows that the proviso to the exemption constitutes the actual working law as applied to the majority of outstanding securities, as well as to a very large part of new securities issued

There is, here, no absolute prohibition of all offerings, but power in the Commission to

> "call for additional and further information than that contained in such manuals with reference to any securities listed therein, and * * * pending the filing of such information suspend the sale of such securities, and also *suspend temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice to the issuer* * * * *if such Commission shall find* * * * *that the sale* * * * *would work a fraud upon the purchasers thereof.*"

Ignoring the unworkable character of this proviso, and the fact that under it the right to sell securities might be suspended without any notice whatever to the actual owners thereof, we have as a substantial proposition the vesting in the Commission of the power at any time to prohibit the sale of particular securities upon its finding as stated.

As to these securities the Act makes no prohibition. They are not in the first instance subject to the law. They are, however, made conditionally subject to the new law-making power of the Commission; that is, to its power to prevent their future sale by administrative mandate at any time. There is no prohibition until the mandate issues, and from that time forward there is a prohibition.

It seems to us quite clear that this is a specific law-making power vested in the Commission over a vast subject-matter of private business and individual transactions.

Here, also, it is urged that the Commission is simply vested with the power to "determine the fact" upon which the law operates. The "fact" to be determined is plainly a conclusion based on "information" contained in the manuals and obtained from unknown sources as to whether or not the sale of such securities comes within a broad legislative field, the control of which is given to the Commission.

Here we have specifically the instance assumed under Point III. The Legislature instead of adopting a law, a rule of conduct prescribing what is right and prohibiting what is wrong, attempts to delegate to the Commission the complete power covering a given field both to determine what is wrong and to prohibit it, to "suspend * * * permanently, the sale of any securities * * * if said Commission shall find that the sale * * * would work a fraud."

The invalidity of the proviso as such destroys the whole Act. Without it it is evident that the exemption would not have been made, and without the exemption it is evident that the Act would not have been adopted.

POINT V.

"The regulations are so utterly unreasonable and extravagant in their language and purpose that the property and personal rights of a citizen are unnecessarily and in a manner wholly arbitrary, interfered with and destroyed without due process of law."

Gundling v. *Chicago,* 177 U. S., 183, p. 188.

1. Little remains to be said on this specific point. We call attention to the fact that the Act goes far beyond the original purpose of the Blue Sky legislation; that it prohibits the entire business and a multiplicity of individual transactions, in order to reach a limited and special class of transactions which are essentially outside of the normal business. On the assumption that one man in a hundred contemplating fraud, the whole hundred are subjected to prohibitions which, as to a large number of perfectly innocent transactions, is necessarily completely prohibitive.

2. The prohibitions of Section 8 are utterly unreasonable and unnecessary for any proper purpose. While to prevent the issue of securities for property at a nominal valuation in excess of real valuation, is undoubtedly within the power and duty of the State creating the corporation, yet after that State has in fact authorized and permitted the issuance of such stock, presumably full paid according to its laws, the stock when issued is an undoubtedly property right, and there is no presumption of fraud or wrong of any kind in its attempted sale.

The duty of fixing the value of property for which stock is issued is in most States vested in the

corporate officers; in some States it is vested in state officials. The presumption must, we think, be that there has been in all cases a valid determination of this fact and that in the judgment of competent authorities the stock has in fact been issued for full value. Notwithstanding this presumption, Section 8 entirely prohibits the sale of the stock in Michigan if upon investigation the Michigan Securities Commission disagrees with the value which has been placed upon the property by the authorities of the issuing State. It is to be noted that this prohibition is absolute as against all non-exempt securities and would apply to securities outstanding for many years. A dealer cannot sell them within the state.

(3) The power given the Commission to "make or have made under its direction a detailed examination of such investment companies' property, business and affairs, which examination shall be at the expense of such investment company" and to make an appraisal at the like expense if its properties, including tangible and intangible assets, is utterly unreasonable, and, as applied to the normal business, potentially prohibitive. If we had an act authorizing the executive to examine any business or transaction at the expense of the individual and upon a finding of wrong in the transaction to prohibit it, such an act would be plainly unconstitutional, but it would fall far short of the present prohibition.

This prohibition rests on the dealer offering securities which have not been approved upon the application of the issuing company. It applies to a very large part of the normal business. As applied to any normal investment offering it is plainly prohibitive.

POINT VI.

The Act impairs the freedom of commerce between the States.

1. The unanimity of opinion expressed by the lower courts on this point must be especially persuasive. They have recognized, as this Court has recognized, the fact that an article of purchase and sale between the states is an article of commerce between the states. There would, we presume, be no question on this point but for the forced construction attempted to be placed upon Nathan *v.* Louisiana, 8 How., 73, and Paul *v.* Virginia, 8 Wall., 168. So far as the latter case goes, the distinction is plain between a policy of insurance, which is a contract between the parties having nothing to do with interstate commerce, except that the parties may reside in different states, and the case of stocks and bonds as subjects of interstate sale.

While in Nathan *v.* Louisana, the tax imposed was upon a dealer in bills of exchange, and the dealer in question dealt in foreign bills of exchange, the Court seems to have looked upon the transaction primarily as involving the question of "the right of a state to tax its own citizens for the prosecution of any particular business or profession within the state." The defendant was a citizen of the state, and he would seem to have been unquestionably liable to the tax as a dealer. The tax was not exclusively upon the sale of bills of exchange between the states, nor was the tax upon the bills themselves. It was a tax upon doing the business which was primarily within the state, and was objected to, it would seem, on the ground that some of the business of the dealer was inter-

state. It seems to us that this case is negligible as applied to the present statute.

Dealing with the question as an open question in this Court the interstate sale of securities seems to us to fall clearly within the opinion written by Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat., 1, at page 189:

> "Commerce, undoubtedly, is traffic, but it is something more: It is intercourse; it describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In Paul *v.* Virginia, in holding that the issuance of a fire insurance policy in a foreign state was not an interstate commerce transaction, the Court said (p. 183), that insurance contracts

> "are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them."

Adding:

> "They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law."

It is evident that the sale of stocks and bonds when issued and offered for sale by a dealer in New York or Chicago to an investor in Michigan,

represents something more than the contract of insurance dealt with in Paul *v.* Virginia. It is a "subject of trade and barter offered in the market as something having existence in value independent of the parties to them," that is, of the parties to the transaction of purchase and sale. "They are not commodities," but it is not necessary that a thing be a "commodity" in order to be a subject of sale or commerce.

The case of International Textbook Co. *v.* Pigg, 217 U. S., 91, is almost, if not quite, on all fours with the present case. The statute in that case was similar, but in some respects not so rigorous as the statute here at issue. The subject of commerce in that case was primarily the intercourse between the parties. The Court, stating that the business of the complainant company was "of a somewhat exceptional character," said (p. 106):

> "It was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and, practically, continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. * * * More than that; this mode—looking at the contracts between the Textbook Company and its scholars—involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Inter-

> course of that kind, between parties in different states—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—'a new species of commerce,' to use the words of this court in Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1, 9."

There was in this case apparently no purchase or sale of books. There was simply a continuous course of correspondence, and the books were shipped and reshipped as a part of the contract. The "intercourse," not the books, was the primary test of commerce. To have held that the transportation of the books as an incident of the intercourse would make the principle of which it was an incident subject to interstate commerce, would of course, have been unsound. No such view seems to have been entertained by the Court.

2. In the case of Darnell *v.* Indiana, 226 U. S., 390, a tax upon shares of foreign corporations was objected to partly on the ground that it was a tax upon property coming from a foreign State, and therefore was in conflict with the commerce clause, under Darnell *v.* Memphis, 208 U. S., 113. Both counsel seem to have recognized that the stock, when sold, would be an article of commerce between the States. The Court seemed to recognize this contention, but decided the case on the ground that the plaintiffs were not within the constitutional protection sought. In the Memphis case the discrimination had been against the crops and the manufacture of products of other States.

See, also, Champion *v.* Ames, 188 U. S., 321, holding that lottery tickets are articles of commerce.

3. It need, we think, hardly be argued that the prohibition placed both on the business and the transaction of the sale of securities by the present act is, as applied to interstate transactions and to the business of the present appellees, in violation of the commerce clause of the constitution. The burden is direct, and in many cases, prohibitive.

The attempt to rely upon the inspection cases is, we think, hardly serious enough to require an answer. It is one of the fallacies of this legislation that fraud in the issuance and sale of securities can be more readily prevented than can fraud in the sale of tangible property. The contrary we think is the fact. Generally speaking, a defect in personal property may be discovered by inspection. A fraud in the issuance of sale of stocks cannot be so discovered. The inspection of the stock or bond as such means nothing. What is attempted by the statute and what is in principle necessary, is an investigation of all the multitudinous elements entering into the question of the truth or falsity of the representations made in connection with the sale of a stock or the soundness of the enterprise on which it was issued. This inspection may extend to China or Peru, and involve reducing to writing for "inspection" the testimony of many persons. The language of the Court in People *v.* Compagnie Gen. Transatlantique, 107 U. S., 59, at 62, is apt:

> "What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken or ex-

amined, it is not inspection in any sense whatever."

An "inspection" to determine the solvency of a corporation, or the good character of an individual, or the truth of a written statement, as a condition precedent to the right of a corporation to sell its stocks, or the right of the individual to buy or sell stocks, or the right to sell a particular stock, is absurd.

POINT VII.

The Act is unconstitutional and void and the orders below should be affirmed.

This act practically vests, or is intended to vest, in the Security Commission the complete power of government over the issue or sale of all securities except the limited classes exempted under (a)—(g) of Section 3. Should the letter of the act be insufficient in a particular case—in other words, could a finding of fraud not be predicated or even if the Commission could not agree that in its opinion the sale would work a fraud; it can by asserting the power of investigation and the prohibitive expense involved against the applicant, drive him from the State. Such is the substance, purpose and effect of the act. In subjecting the appellees to this autocratic power it destroys their liberty, takes their property, and impairs the freedom of commerce, and at the same time violates the specific prohibitions of the State Constitution.

Respectfully submitted,
GEORGE W. WICKERSHAM,
ROBERT R. REED,
Counsel for named Appellees.

CHARLES K. ALLEN,
Of Counsel.

Appendix.

Bank Supervisor's Proposed Blue Sky Law, with Statement by Committee Appointed by National Association of Supervisors of State Banks. (Italics ours.)

Proposed Blue Sky Act.

Section 1. If any person, including a corporation or association, and the officers or agents thereof, alone or in common with others, having devised or intending to devise any scheme or artifice to defraud by the issuance, sale, promotion, negotiation or distribution of any stocks, bonds, notes or other securities, shall in or for executing such scheme or artifice or in attempting so to do, commit any overt act within the State, such person shall, upon conviction, be punishable by a fine of not more than $5,000 or by imprisonment for not more than *five* years, or by both such punishments, at the discretion of the Court. (Adapted from the Federal Postal Laws, R. S., Section 5480.)

Section 2. Every person, firm, corporation or association, hereinafter called the dealer, who shall, as principal or agent, promote by advertisement, circular, prospectus, or by any other form of public or general offering or through agents, the sale of any securities in this State (except to banks, bankers, trust companies, dealers or brokers in securities), shall, prior to or at the time of making such promotion, notify the (official or Board) of such fact, describing such securities, and file from time to time any and all prospectuses and circulars, if any, used or to be used in such promotion, and such (official or Board) may

make such investigation thereof and require such information or proof with respect thereto as (he) may deem necessary to determine the character of such securities and of such promotion. If any such dealer shall mail, postpaid and properly addressed to the (official or Board), a prospectus or circular containing the offiering of any such securities, with the name and address of such dealer, the same shall be deemed a notification under this section of the promotion thereof as aforesaid.

Section 3. The provisions of Section 2 shall not apply to the offering or sale of any securities on any recognized exchange in this State, nor to the advertisement or sale thereof at public auction or pursuant to the order of any Court, nor to the advertisement of any securities in any magazine or newspaper published outside of the State, unless the dealer shall cause the same to be distributed in the State.

Section 4. Such (official or Board) may also make such special investigation as may be deemed necessary, in connection with the promotion of any securities under this act, to determine whether the same constitutes a violation of this act by any individual corporation or association, and such (official or Board) shall have the power to issue subpœnas and process compelling the attendance of any person and the production of any papers and books for the purposes of such investigation and examination, and shall have power to administer an oath to any person whose testimony may be required on such examination or investigation.

Section 5. If such (official or Board) shall determine that any such promotion constitutes a violation of this act, (he) shall immediately take such steps as may be necessary to cause the arrest and prosecution of all persons deemed guilty thereof. It shall be the duty of any District Attorney to prosecute any violation of this act in his county and upon request of the (official or Board) the Attorney-General shall direct and control such prosecution.

Section 6. Any person who shall knowingly make or file or cause to be made or filed any statement, information or proof required hereunder by such (official or Board), which is materially false, or who shall promote or cause to be promoted by advestisement, circular, prospectus or by any other form of public or general offering or through agents, the sale of any securities, without complying with Section 2, except as therein excepted, or without furnishing to the (official or Board) any information or proof in the possession of or reasonably obtainable by such person, if and after the same are required by the (official or Board) under such section, shall upon conviction, be punished by a fine of not more than $1,000, or by imprisonment for not more than one year or by both such punishments, at the discretion of the Court.

Section 7. Every dealer in securities, including every person, firm, corporation or association engaged in the business of selling stocks, bonds, notes or other securities, having a place of business in this State, shall annually on the first day of , file with the (official or Board) a statement showing the name and busi-

ness address in the State of such dealer and if the principal office of such dealer is out of the State, the address of such principal office, and if such dealer is a corporation or association organized under the laws of another State the address of the principal office of such corporation in such State. Such statement shall be accompained by a filing fee of twenty-five dollars . Every agent of any such dealer not having an office in this State or not having filed such statement as aforesaid, who shall in this State offer or sell any such securities, shall, annually on the first day of or thereafter, and before he shall in this State offer or sell any such securities, file a statment with the (official or Board) showing the name of such agent and his address if any in this State and the name and principal office of any such dealer, and if such dealer is a corporation or association organized under the laws of another State, the address and principal office of such corporation in such State. Such statements shall be accompained by a filing fee of three dollars. A violation of this section shall be punished by a fine not exceeding $500.

STATEMENT OF COMMITTEE.

To the National Association of Supervisors of State Banks.

A resolution was adopted at the last annual Convention of the National Association of Supervisors of State Banks, reciting "that inasmuch as the operation of the Blue Sky Law in different States has met with uncertain results, therefore be it resolved that this Association offers to co-operate with the so-called investment bankers to secure uniform laws which will be practical in effect."

The undersigned Committee was appointed pursuant to this resolution. It presents herewith a proposed law which embodies what seem to it to be the fundamentals, so to speak, of an effective and constitutional blue sky law. These features are:

1. A fraud provision adapted from the existing Federal law. Such a provision should in our opinion be the basis of any legislation on this subject. *Without it, a blue sky law may serve to ward off obvious frauds: it cannot be a deterrent and is in fact an aid to more skilful frauds which are not detected in the first instance.*

2. A provision requiring that a State official be notified of all offerings of securities made within the State. This publicity feature has, we believe, been the cause of the great success of the Kansas type of law, and for it credit is due to the originators of that law. It compels every promoter to make his presence and purpose known. This requirement standing alone is practically prohibitive of two-thirds of the frauds.

3. Provision giving general power of investigation to the State official to uncover fraud in any promotion *This provision has been devised by the Committee to meet all kinds of instances.* The Committee does not believe it advisable for the statute to attempt to specify either the procedure or proof necessary to uncover fraud. There can be no rule applicable to all cases, and the requirement of some matters suggests the exclusion of others. There could not be uniformity in practice, and it is not wise to attempt it in a statute covering so large a field.

We believe this proposed law is capable of enforcement, and incapable of evasion. It does not purport to give the sanction of the State to any

offering. *It does not make the offering subject to State approval, but it puts the State in a position where if the offering is fraudulent, it can be stopped in the most effective way, i. e., by prosecution.*

We do not believe ingenious stock frauds can be prevented by requiring them to obtain a State license; there being no penalty attached to the making of the application, and the license if granted being in fact a material aid to the fraud

We do believe that all fraud can be prevented by making it unprofitable, that is, by imposing heavy penalties upon it and providing adequate machinery for its detection and punishment.

The proposed law, however, speaks for itself. It is plain reading, based on a general principle, and puts the whole matter with plenary power in the hands of the State, the prosecutor, the Court and the jury.

Dated, New York, January 27th, 1915.

EUGENE LAMB RICHARDS,
Chairman.

WM. H. SMITH,
GEO. M. LA MONTE,
Committee on Blue Sky Legislation
of National Association
of Supervisors of State Banks.

OCT 1 1916
JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 413

FRANK W. MERRICK, JOHN W. HAARER AND GRANT FELLOWS,

Appellants,

vs.

N. W. HALSEY & COMPANY, ET AL, AND WEIS FIBRE CONTAINER CORPORATION,

Appellees.

BRIEF FOR APPELLEES.

WEIS FIBRE CONTAINER CORPORATION, WM. P. BONBRIGHT & COMPANY, WILSEY, FIERLIEN COMPANY, OTIS & COMPANY, BOLGER MOSSER AND WILLIMAN

HAL H. SMITH,
Attorney for the Above Named Appellees.

DETROIT:
CONWAY BRIEF CO., 142-150 LAFAYETTE BOULEVARD
1916

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BRIEF FOR APPELLEES

WEIS FIBRE CONTAINER CORPORATION, WM. P. BONBRIGHT & COMPANY, WILSEY, FIERLIEN COMPANY, OTIS & COMPANY, BOLGER MOSSER AND WILLIMAN

INTRODUCTION.

The statement of the appellants as to the parties to this litigation and as to the pleadings is correct. It should, however, be pointed out that the bills of complaint assert-

ed that an irreparable injury would result to the plaintiffs by reason of the enforcement of the act and that the affidavit filed with the bill (see Rec. p. 88) and the intervening petitions likewise showed that irreparable injury would result if the act were enforced against the plaintiffs and the interveners. It was on the motion for the preliminary injunction that Judges Dennison, Sessions and Tuttle held the act to be invalid and unconstitutional and it was from the order directing that such preliminary injunction issue that the appeal is taken (Rec. p. 108). The assignment of errors (Rec. pp. 109-111) include assignments directed to the question of the jurisdiction of the court, and as to the showing of the plaintiffs of irreparable injury. Assignment No. 8 alleged that "the Court erred in holding and adjudging that said proceedings are not suits against the State of Michigan." The Appellants now make no question as to the jurisdiction of the Court, nor as to the showing of irreparable injury, nor do they insist that the suit is one against the State of Michigan. The questions raised upon this appeal are, therefore, directed solely to the invalidity of the statute as to whether or not it violates constitutional rights.

In the brief of Appellants at page 73, it is asserted that there is no allegation in the bill of complaint that the plaintiffs do not maintain offices in the State of Michigan and that no claim is made that the securities handled by the plaintiffs are brought into the state and sold in "original packages." The bill of complaint of the dealers N. W. Halsey & Company et al did assert (Paragraph 6, Rec. p. 3) that these plaintiffs send their agents into the State of Michigan and that these agents there solicit orders which they transmit to the offices of the plaintiffs outside the State of Michigan and that the securities so ordered and purchased were forwarded direct to the purchaser in Mich-

igan from the offices of the plaintiffs without the State of Michigan. The bill of complaint of the Weis Fibre Container Corporation (Rec. p. 35) does not include this allegation. This plaintiff is a manufacturing corporation and it has complied with the statutes of Michigan permitting it to do business therein. The petition of Otis & Company for intervention, which is typical of the other petitions, asserts (Rec. p. 92, paragraph 4) that this company sends its agents into Michigan to solicit the sale of securities and that these agents transmit orders they receive to the office of the petitioner in Cleveland, Ohio, and that "thereafter a delivery of such securities is made by such petitioner in interstate commerce," to the purchaser thereof in the State of Michigan.

It is our position that it was not necessary to formally deny that any of the plaintiffs and interveners had an office within the State of Michigan or to specifically assert that when the securities, for which their agents had transmitted orders to the office outside the State, were delivered in the State of Michigan they were so delivered in "original packages," within the meaning of the original package liquor cases.

Synopsis of Argument.

We shall not attempt in this brief to answer categorically the argument of the Attorney General, but shall content ourself with analysing the act in question and the objections against it as we see them. We shall emphasize the fundamental objections to the law. We do not mean that the act should not be destroyed if it offends in any way against the Constitution. The rights of the plaintiffs demand that result. But we do desire that the basic theory upon which the law stands be emphatically condemned. The argument, therefore, falls under the following heads:

1.

The act, the Blue Sky Law of Michigan, is not a valid exercise of the police power. It is a clear and unmistakable infringement on constitutional rights.

II.

The State, in the exercise of its police power, has no right to prohibit interstate trade in legitimate articles of commerce. Stocks, bonds, and securities, as defined by this law, are legitimate articles of commerce. The traffic in these articles between several states is interstate commerce. This law prohibits, burdens and regulates this traffic, and is therefore in conflict with the Federal Constitution.

III.

The Statute vests an arbitrary power in the Commission. The rule by which the Commission is to approve or disapprove securities presented to it is the opinion of the Commission that the sale of such securities will work a fraud. To confer upon the Commission the power to regulate the sale of the securities described in the act according to its arbitrary opinion subjects those securities to the practically uncontrolled discretion of the Commission, and the act for this reason is invalid.

IV.

The title to the act covers more than one object and does not express the objects set forth in the Statute. It, therefore, offends against Section 21, Article 5 of the Constitution of the State of Michigan.

V.

The Statute is class legislation, and is, therefore, void. It discriminates as between securities of the same character and the same class.

VI.

The Act delegates to the Michigan Securities Commission legislative authority and it is void for that reason.

VII.

The act confers upon the Securities Commission judicial power. It is, therefore, in violation of the Constitution of the State of Michigan.

VIII.

The law cannot accomplish its purpose. The commercial situation as described by the appellants offers no justification for a law of this character, nor for this particular statute. A multiplicity of ill-considered statutes of the same general character as this law furnishes no argument sustaining the Michigan Blue Sky Statute.

An Analysis of the Blue Sky Law.

The counsel for the appellants has included in his brief the entire of the Act in question here, but a brief analysis of its provisions will not, we think, be out of place.

Act 45 of the Public Acts of Michigan of 1915, the so-called "Blue Sky Law" purports to regulate so-called "investment companies," their securities and persons dealing therein. "Investment companies," as defined by the Act, includes "every person, corporation, co-partnership, company or association" which shall either himself, themselves or itself, or by or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, them or it, within the State of Michigan.

The securities of this or any other State, or of municipal corporations, state and national banks, trust companies, "public or quasi-public corporations," corporations not for pecuniary gain, are exempted from the Act. So also are mortgages on real or personal property situated within the state where the entire mortgage is sold in one sale.

An "increase of stock sold and issued to stockholders" and stock dividends are exempted, as are "securities listed in any standard manual of information approved by the Commission. Unsecured commercial paper is likewise exempted.

The term "investment companies" includes all persons and corporations which issue stocks and bonds, and therefore includes all manner of business enterprises, manufacturing, mining, land-owning, mercantile and farming, should any such enterprise issue securities and sell them in Michigan.

The Act creates the Michigan Securities Commission to consist of the State Treasurer, the Commissioner of the Banking Department and the Attorney-General of the State.

The "investment company," before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner of the securities of its own issue not exempt under the Act, must

(a) File with the Securities Commission

1. "A statement showing in full detail the plan upon which it proposes to transact business."

2. "A copy of all contracts, stocks, bonds, or other instruments which it proposes to make with or sell to, its contributors or customers."

3. A copy of its prospectus and of the proposed advertisements of its sale of stocks, bonds and other securities.

4. A statement which shall show the name and location and head office of the "investment company" and the names and addresses of its officers.

5. An itemized account of its financial condition and the amount of its assets and liabilities?

6. Such other information touching its condition and affairs as the Commission may require.

7. If it be a co-partnership it shall file a copy of its articles.

8. It it be a corporation, a copy of its articles, constitution and by-laws.

9. If it be organized under the laws of another state, it must file, in addition, a certificate that it is entitled to transact business in Michigan.

(b) Pay a filing fee of one tenth of one per cent on the face value of the securities, such fee to be not less than Ten Dollars, nor more than One Hundred Dollars. (Sec. 4.)

(c) File its consent, if it be a foreign "investment company" that actions may be begun against it by service of process on the Commissioner of Banking. (Sec. 6.)

(d) Submit, at the option of the Securities Commission, to an examination of all its business and affairs at its own expense. (Secs. 8 and 13.)

(e) Register all its authorized agents with the Securities Commission (Sec. 12) and pay fees therefor.

After conforming to the Act and the requirements of the Commission, the "investment company" must further:

(a) File each January a detailed report of its condition and such other information as may be required by the Commission (Sec. 21).

(b) Keep its accounts in a certain prescribed manner (Sec. 13).

(c) Keep its books of account open to the Commission.

(d) Permit any information in regard to its business to be furnished to the public by the Commission (Sec. 16).

(e) Permit a further examination, at the will of the Commission, and pay the fee therefor, whenever the Commission deem it advisable.

After the filing of the application and compliance with the terms of the Act, it is still unlawful for the "investment company" to sell or offer for sale its securities until permission is given by the Commission, and this permission or approval is only to be obtained after a hearing. If the application is filed more than twenty-four hours before the monthly meeting of the Commission, it is heard at the next regular monthly meeting. It may be heard at a special meeting on two days' notice to the applicant (Sec. 7).

The Commission *may adjourn these hearings at its will,* may ask for further information and may make a detailed examination of the Company's affairs and an appraisal of its property (Sec. 8).

There can be no dealing in the securities on which the application is filed until they have been approved by the Commission, and no time is fixed in which that approval must be given. There is, therefore, a period of suspense during which sales of securities otherwise lawful are prohibited, and the length of this period rests solely in the convenience or whim of the Commission.

As already noted, the Commission may, before approving the securities of any applicant, not only examine its affairs and summon its officers to testify under oath. It may also *appraise* the applicant's property (if it be a corporation). (Sec. 8) and fix the amount of securities which the company may issue in payment for the transfer of "property, patents, good-will, promotion and intangible assets." The appraisal shall be at the expense of the Company (Sec. 8). How it would be accomplished if the Company were a non-resident of Michigan is not set forth in the statute. The Commission may withhold the permission to sell until any excess of securities over its valuation of the property transferred for same has been either delivered and canceled or placed in escrow (Sec. 8).

The Commission, upon the hearing and examination of the applicant, must disapprove the securities if it finds that the proposed plan of business of said investment company, or its proposed contracts, stocks, bonds, or other securities, *are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would, in the opinion of the Commission, work a fraud upon the purchaser.*

If the Commission does not so find, it issues its certificate in the form set out in the statute (Sec. 9), as follows:

> "This is to certify that the.....has this date been given permission to sell $.....
> of its.....within the State of Michigan.
> stocks, bonds or securities
> The Commission does not recommend the purchase of this security."

A violation of the Act by the "investment company" or any other person is made a misdemeanor and is punished by a fine of not more than One Thousand Dollars or imprisonment in the county jail for not more than one year, or both such fine and imprisonment (Sec. 23).

The Act also defines "dealers in such securities" and prohibits any such dealer selling or offering for sale any securities covered by the Act (Sec. 10), unless and until he shall:

(a) File a list of such securities with the Commission (Sec. 10).

(b) Register with the Commission (Sec. 11), and furnish it with certain information.

(c) Pay a registration fee.

(d) File, if a non-resident, an appointment of the Banking Commissioner as his agent to receive service of process.

(e) Pay a fee for each agent.

When a dealer has so complied with the Act, he will receive a license from the Commission (Sec. 11), but he can-

not sell the securities of any investment company unless such company and such securities shall have complied with the Act and been approved by the Commission (Secs. 14 and 15). The dealer himself, however, if the investment company has not complied with the Act, may make application for the approval of the securities (Sec. 15).

The dealer, therefore, is prevented from selling the securities defined by the Act except under extraordinary restrictions and regulations and a sale by a dealer, in violation of the Act, of any securities covered by the Act is made a felony (Sec. 23).

ARGUMENT.

The Police Power and this Act.

THIS ACT, THE BLUE SKY LAW OF MICHIGAN, IS NOT A VALID EXERCISE OF THE POLICE POWER. IT IS A CLEAR AND UNMISTAKABLE INFRINGEMENT ON CONSTITUTIONAL RIGHTS.

We desire here, before we discuss the objections against the Act so far as the police power is concerned, to emphasize that the law is not directed at any single occupation or business. It attempts to regulate the issue of securities by any individual person, partnership or corporation in any and all business enterprises.

Dealers in securities are regulated it is true and to that extent the business of dealing in investment securities is regulated. But the regulation of the dealer and his

calling is incidental to the main purpose of the Act which is the regulation and prohibition, unless in compliance with the Act, of the issue of stock and bonds by corporations and the making of loans in certain forms by individuals, co-partnerships and associations. The burden of the law falls somewhat upon the dealer but its heaviest load rests upon the issuer of the stocks, bonds or securities and the issuer may be any person, corporate or otherwise, engaged in any business whatever, except only the exempted classes.

Clearly there is no such thing as the business of making loans, the business of issuing bonds, the business of issuing stock as applied to the entire business world. These acts are the incidents of any occupation and any business.

At the outset we must therefore differentiate this law from those regulating corporate organizations and fixing the terms upon which a corporation may do business, since this law applies to individuals and co-partnerships as well as to corporations.

We must separate it also from laws regulating those engaged in certain callings which have always been more or less within reach of the police power, such as employment agents and brokers. We must differentiate it also from laws regulating certain business affected with the public interest such as the banking or insurance business, since this law does not segregate any certain business but rather attempts to reach all businesses. And it can hardly yet be said that any business which issues stock or makes loans in the form described by the Statute is affected by the public interest.

Here, however, we touch upon the gist of the appellant's argument. We understand that their position must be, in the last analysis, that any business becomes affected by the public interest so that the police power may prohibit or regulate it, when it offers to any part of the public any stocks, bonds or other securities for sale "in the course of continued and successive transactions of a similar nature."

If this be so all business enterprises must be said to be, at one time or the other, "affected by the public interest." Certainly all large business enterprises would be so affected and that without any wish of their own since the public eagerly deals in their securities, whether they offer them for sale or not.

But this application cannot be made of the phrase "affected by the public interest." That phrase and the consequent exercise of the police power must be limited to occupations, callings, businesses which, by their individual inherent nature are more closely related to the public welfare than are others. And it cannot be applied to an incident of all business and one which may arise at any time in the farming business, the manufacturing business or the investment business.

If this distinction is sound, and we believe it is, it relieves us of the necessity of reviewing the arguments of the appellants which are based on cases referring to specific callings and occupations.

Some better and broader reason must be found for sustaining the law.

We call attention to these matters at the outset because if we were to criticize in any way the excellent brief of

the appellants, we thing we would suggest that it always keeps it clear that the law applies to individuals as well as to corporations and to all manner of business as well as that of the dealer in corporate securities.

The issue and sale of securities is a part of the freedom guaranteed by the 14th amendment to the Federal Constitution and by the Constitution of Michigan.

The State does not contend that the right to issue and sell stocks, bonds and other securities is not a part of the liberty guaranteed by the Constitution. The issue and sale of these securities is in effect the making of contracts "proper, necessary and essential" to the pursuit of lawful livelihoods or avocations.

Allgeyer vs. Louisiana, 165 U. S. 578;
Kuhn vs. Detroit, 70 Mich. 537;
People ex rel Valentine vs. Circuit Judge, 124 Mich. 164.

This Act, by its prohibition of the sale of securities until the permission of the Commission and by its extraordinary restrictions upon the right to issue and sell such securities impairs the freedom guaranteed by the Constitution.

There is no question but that the Act does interfere with the right to issue and sell securities.

The Act absolutely prevents the sale of securities by the issuer thereof or by a dealer therein except upon the permission of the Commission.

The right to issue stock, to execute bonds and to secure their payment by the pledge of property is of no value unless the stock and bonds can thereafter be negotiated. This the law prevents except under heavy restrictions.

The law lays its burden not only upon the specific transaction and the particular investment company. By its sweeping definition of investment companies, it regulates all manner of business enterprises and all kinds of manufacturing and mercantile pursuits.

The burdens of the law are fourfold: the requirement as to the application; the payment of fees; the privilege of inspection, examination and appraisal; and the suspension of the right to sell or dispose of the securities, even though lawful, until the permission of the Commission is forthcoming.

The requirement as to the application is in itself burdensome. It includes not only a complete statement of the applicant's financial condition and copies of its articles, but also a consent that it may be sued in Michigan by service on the Commissioner of Banking. If the applicant is an individual or a co-partnership, a substantial right has been taken away.

Moredock vs. Kirby, 118 Fed. 180.

The fees prescribed by the Act may or may not be onerous according to the financial status of the applicant, but they are fees "for the right to carry on business" and if the business be legitimate, are not within the right of the Legislature to impose.

People ex rel Valentine vs. Circuit Judge, 124 Mich., 664.

The right of the Commission to examine, inspect and appraise is extraordinary. The cost of such examination and appraisal is to be paid by the Company and no limit is set upon it. As the lower court said (Rec. p. 102):

> "There is no limit to either the time which may be consumed or the amount of expense which may be imposed."

The suspension of the right to dispose even of a perfectly lawful and valid security until the Commission's finding is made is the most burdensome of the extraordinary restrictions of the statute.

In the 1913 Michigan Statute, it was provided that a period of thirty days must elapse from the date of the application during which all dealing was suspended. At the expiration of that period, if the Commission had not denied permission, the sales could begin. This definite suspension was condemned by the Court.

Alabama, etc. Co. vs. Doyle, 210 Fed. 173

The new statute substituted a provision forbidding any transactions until the affirmative finding and consent of the Commission, but fixed no limit to the time during which the finding can be delayed. As the lower court observed:

> "This change in the law has not diminished this burden in directness or in weight."

Are these burdens and restrictions within the police power?

These extraordinary burdens and restrictions upon business transactions otherwise lawful are justified by the state as a proper exercise of the police power. It is argued that the purpose of the statute is to prevent fraud, that that purpose is lawful and that the restrictions in the statute contained are proper to accomplish this end.

The purpose of the statute, however, is not to regulate fraud, but rather to prevent financial loss.

The history of the statute is here instructive and conclusive. The statute is a substitute for the Act of 1913, which was declared invalid in *Alabama, etc. Co. vs. Doyle*, 210 Fed., 173. In that statute the final test to be applied to the security was whether or not it would "in all probability result in a loss to the purchaser." The Court condemned this statute and particularly this provision, saying:

> "The element of fraud is wholly eliminated from this part of the statute and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power which we have seen or which the industry of counsel has found is broad enough to cover such prohibition and we are aware of no consideration which even plausibly supports its validity."

It was to meet this objection that the 1915 law attempted to modify the tests to be applied by the Commission and the new statute is therefore quite frankly a recognition by the Michigan Legislature that it has no right to regulate financial loss.

The test of the approval of the Commission is now not "the probability of loss," at least so states the statute, but the "probability of fraud." The words "to prevent fraud in the sale thereof" in the title to the former Act now appear at the beginning of the new title "An Act to prevent fraud in the sale," etc. But has the real standard of the Commission's action been changed? So long as the ostensible test is *probability* can it be in reality anything but *probability of loss?* How can the Commission determine any other probability? Loss may be the inevitable result of the nature of the security. But there can be no fraud without deception. How can the Commission pass on the future intention of the seller and the future knowledge of the buyer?

There is, however, one new section in the law which deals exclusively with the probability of loss and as the lower court pointed out makes clear the meaning of the phrase in the "opinion of the Commission work a fraud on the purchaser." Section 8 provides for the appraisal of property turned over to a corporation to pay for its stock. "It may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, etc." * * * And said Commission may withhold its license to sell such stocks and bonds and securities if such corporation has issued stocks, bonds and securities in payment for property, etc., *in excess of their value.*

This surely has no relation to the probability of fraud and it is the key to the whole statute. The Act is still directed to financial loss and the probability of loss still remains the test of the Commission's action. The Commission is in effect to fix the price at which securities are to be sold so that not only fraud but *loss* may be prevented.

But let us assume for the sake of argument that the real purpose of the law is the protection of the public against fraud and not against loss. Before we can even then sustain the act, we must still inquire whether or not the fraud there referred to is proper object for the police power. Can the occasional fraud, that fraud which arises in the individual transaction justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business, a fraud which the business itself, from its character and the manner in which it is generally conducted invites and encourages.

It should be remembered that the proposal is not to regulate certain kinds of business but all business when it

issues and sells securities not in the exempted classes. It is not to regulate certain persons doing certain business, but all persons doing the acts described.

Regulation of all business for the purpose of reaching the occasional fraud is clearly not justified. The fraud must be necessary incident to the particular business, or the business must lend itself particularly easily to deception, else the business cannot be regulated—only the fraud therein.

> "It is a novel legislation," said Justice Parker in *People ex rel. Tyroler vs. Warden*, 157 N. Y. 116, "indeed, that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it."

To say that there is a necessity for such a law affecting substantially every issue and negotiation of corporate stocks or evidences of debt is to indict all business and all business men as fraudulent.

This law subjects to the Commission's authority all secured commercial paper. Will the Court, bearing in mind the tremendous volume of this form of security and the great part it plays in all commerce, say that it is so commonly fraudulent as to require this regulation? The mere statement of such a possibility is absurd.

The law regulates the issue and sale of corporate securities. The corporation is today the prevailing form of business organization. Corporate capital stock is the universal and convenient method by which a great per cent of our business property is generally represented and bought and sold. The corporate bond and mortgage is the familiar and general way of securing the long time loan. Both the stock certificate and the bond pass freely as negotiable, or quasi-

negotiable instruments. The statutes authorize investments in them by trustees and savings banks. To now say that all corporate business and these securities are so frequently the vehicles of fraud and lend themselves so easily to deception that their entire issue and all their sale must be regulated as this law regulates them, is to declare the very basis of modern business to be fradulent.

To paraphrase the language of this Court in *Tanner vs. Little*, 240 U. S. 369, we may assume that this statute was "enacted upon a belief of evils." But surely that belief is "arbitrary" if it imputes the widespread fraud which must be assumed to justify such a wholesale regulation of modern business.

The language of the lower court in the case on the 1913 law cited supra, is extremely pertinent.

> "When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions. We cannot shut our eyes to the fact which all men know that, as compared with the total dealings in securities covered and contingently prohibited by this act, those which may fairly be suspected to be of a fradulent character are a very trifling proportion; and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations."

The words of the Michigan Supreme Court in *People ex rel. Valentine vs. Circuit Judge*, 124 Mich. 664, cited by the lower court are no less in point.

> "The business of buying and selling on commission has existed ever since commerce began. There

are and always have been dishonest men engaged in it, as there are and always have been in every other branch of business. There are and always have been dishonest sellers, who will pack their produce in such a manner as to deceive. It would be as reasonable to require the latter to give bond to properly pack their produce. In every such case the common law provides an ample remedy for redress to the injured party for breach of contract. There is no more reason why a commission merchant should pay a license fee, and execute a bond to pay his debts and to do his business honestly, than there is that any other merchant should pay a like fee, and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, health, morals, or even convenience, of a community. It is carried on by private persons in private buildings, and in a manner no different from that in which the merchant selling hardware or groceries or dry-goods carries on his business. The law can find no support in the police power inherent in the State."

But it is urged that in view of the action of the Legislature, the Court has no power to determine for itself that no necessity exists for this statute. This we do not admit.

We shall not discuss at length the power of the Legislature to bind the Court in this respect. There is of course a line beyond which the lawmaking power cannot go—and within which the judicial power is supreme.

In *People vs. Smith*, 108 Mich. 527, the Michigan Court asserted its right to review, under certain conditions, the determination of the Legislature as to the necessity of police power legislation.

In discussing the validity of a law regulating the use of emery wheels, it said:

> "Each law of the kind involves the questions: (1) Is there a threatened danger? (2) Does the regulation invade a constitutional right? (3) Is the regulation reasonable? * * * All, then, seems to be embraced in the question of necessity. * * * If the Courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts *of which judicial notice* may be taken, then the act must fall."

We are content to accept to the fullest extent the holding of this Court in *Rast vs. Van Deman & Lewis Company*, 240 U. S. 342, and to admit that there does exist in the Legislature the power "to regulate conduct and contracts and in the exercise of the power to classify objects, upon its conception of the public welfare, the right of review to be exerted by the Courts only when the legislation is unreasonable or purely arbitrary."

We insist that this law should be condemned by the Courts under the application of this rule. We submit that the Court must say that the Legislature has here overstepped the bounds of its power. The Court acting on its own knowledge cannot assert that modern business is so generally fraudulent that this regulation is necessary for the public good, and it should say that the legislation is both "unreasonable and purely arbitrary."

But even if the Court should yield to the Legislature the right to so indict the business world as fraudulent and should consent that the Legislature's decision as to the necessity for the law was final, there still remains the question as to whether the restrictions in the statute are not arbitrary and unreasonable.

Such a statute to be valid must not only have a relation to the public welfare but it must not be unreasonable. There might in other words be an evil which needed correction but the effort to correct it might unreasonably destroy rights; it might be an "arbitrary and oppressive interference with the right of contract."

We submit that the restrictions and burdens of this statute do so arbitrarily and unnecessarily interfere with constitutional rights.

The statute absolutely suspends the issue, negotiation and sale of the securities for a period limited only by the whim of the Commission. The complete honesty in the transaction, the highest value in the security, cannot obviate the operation of the statute to prevent the issue or sale thereof.

Must all honest business where loans are negotiated and corporate securities sold be suspended for even one day to permit the Commission to investigate the probability of fraud? And how can any time limit be set upon the right to honestly buy and sell? We insist that any such limitation is vicious and beyond any theory of the police power. The ordinary course of such business does not yet carry any such badge of fraud so that this restriction is required.

The provision of Section 8 for an appraisal is another requirement so unreasonable and drastic as to be beyond the power of the State. As to corporations organized within Michigan the State has already set its seal of approval on the payment of property for stock. The oath of the incorporators is required as to values and the property must be of a certain kind and be itemized in the articles. Now comes the Securities Commission to appraise the property, take the stock into escrow, or demand its cancellation or deposit before it can be sold. A single stockholder attempt-

ing to sell his stock through a broker or dealer could involve all the others in litigation and loss. The approval of the State on the company's charter would be set aside and good faith purchasers of the securities caused both loss and embarrassment.

The requirement that all foreign investment companies must consent to the jurisdiction of all the courts of the state is another unreasonable restriction. It is settled that a corporation cannot be required to so submit itself.

Sioux Remedy Co. vs. Cope, 235 U. S. 197.
Buck Stove Co. vs. Vickers, 226 U. S. 205.

As to non-resident individuals the law is equally clear. It violates the constitutional right of such non-residents by depriving them of the immunity or exemption allowed to citizens of this State, since citizens of Michigan must be sued by personal service.

Moredock vs. Kirby, 118 Fed. 180;
Caldwell vs. Armour, 1 Penn. (Del.) 545;
See 9 Fed. Statutes, Ann. p. 176.

The law cannot be defended as a licensing law or an inspection statute.

We now turn to the theories of the defense of the law. It is asserted that it is a licensing law. It provides for a dealer's license and there is an effort to use in its language the "nomenclature of a license law." But there is no similitude in its essentials to a license act. It deals with individual transactions. While the investment company receives a certificate of approval on each issue of securities there is no license to permit it to issue other securities. There is only the single approval. A new application must be made on each new security. The test of the permission is not the character of the dealer or his solvency.

It is the character of the security. The dealer is not licensed. The dealer who is licensed can sell only approved securities.

Nor is this Act an inspection statute though there has been an insistent effort to bring it within that definition.

The Supreme Court of the United States in *People vs. Compagnie Gen. Transatlantique,* 107 U. S. 59, defined inspection and denied the constitutionality of a New York Statute for the "inspection" of immigrants.

Justice Miller said:

> "What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken or examined, it is not inspection in any sense whatever."

In *Gibbons vs. Ogden,* 9 Wheat 1, 203, the Court limited inspection laws to articles of food, agriculture and manufacture. They have never been extended beyond the inspection of tobacco, *Turner vs. Maryland,* 107 U. S. 38; of butter, *Plumley vs. Mass.*, 155 U. S. 461; flour, *Voight vs. Wright*, 141 U. S. 62; hides, *Neilson vs. Garza,* 2 Woods 287; fertilizer, *Pataspsco Guano Co. vs. North Carolina*, 171 U. S. 345; cattle, *Minnesota vs. Barber,* 136 U. S. 313.

In the recent case of *Sligh vs. Kirkwood*, 237 U. S. 52, 59, the same definition is clearly indicated:

> "The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared

> by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. 'Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.' *Bowman vs. Railway Co.*, 125 U. S. 465, 489."

We conclude our inquiry into the relation of this law to the police power by inviting the Court to read the words of the Supreme Court of Michigan in *People ex rel. Valentine vs. Berrien Circuit Judge*, 124 Mich. 664.

In this case the Court considered a law requiring "persons, firms and corporations who hold themselves out as commission men, brokers, agents, or merchants and their agents, to give bonds to pay their debts." The opinion is brief and we quote it in toto:

> "Grant, J. (*after stating the facts*). Acts of this character, when valid, must find a reason for their existence in the police power of the State. The act is not aimed at brokers, in the ordinary meaning of that word. It is not aimed at commission merchants generally. It is aimed solely at commission merchants who engage in the business of selling farm produce for producers upon commission. It provides that such a merchant shall pay a fee and execute a bond, as conditions precedent to doing business. The condition of the bond is the honest and faithful performance of his contracts. The

business of buying and selling on commission has existed ever since commerce began. There are and always have been dishonest men engaged in it, as there are and always have been in every other branch of business. There are and always have been dishonest sellers, who will pack their produce in such a manner as to deceive. It would be as reasonable to require the latter to give bond to properly pack their produce. In every such case the common law provides an ample remedy for redress to the injured party for breach of contract. There is no more reason why a commission merchant should pay a license fee, and execute a bond to pay his debts and to do his business honestly, than there is that any other merchant should pay a like fee, and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, health, morals, or even convenience, of a community. It is carried on by private persons in private buildings, and in a manner no different from that in which the merchant selling hardware or groceries or dry-goods carries on his business. The law can find no support in the police power inherent in the State. It is not like the liquor traffic, which, under the decisions of every court, is subject to the police power, because of the injury it does to the health, morals, and peace of the community, and may be prohibited altogether. Neither is there anything in it requiring regulation, as do hack-drivers, peddlers, keepers of pawnshops, and the like. The legislature of this State is not empowered by the Constitution to regulate contracts between its citizens who are engaged

in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them. The Constitution guarantees to citizens the right to engage in lawful business, unhampered by legislative restrictions, where no restrictions are required for the protection of the public. We are compelled to hold this law void, because (1) it is class legislation, and (2) it is an unjustifiable interference with the rights of citizens to carry on legitimate business.

"It is unnecessary to discuss the other questions raised. The writ is denied.

"The other Justices concurred."

It may, perhaps, be of some service if we should classify the cases which are cited by the appellants as sustaining its theory that this law is within the limits of the police power. The appellants rightly concede that no law of this precise character is yet upon the statute books and insist very properly that the limits of the police power cannot be accurately defined but must be, to quote the words of Justice Holmes in *Noble State Bank vs. Haskell*, 219 U. S. 104, 112, "pricked out by the gradual approach and contact of decisions on the opposing sides." But an analysis of the decisions cited by the Attorney General will indicate that they fall in certain well-defined classes and that they are as we have already pointed out, governed by principles substantially different from those which are invoked to sustain this law. They may be assembled under the following heads:

Those concerned with the statutes regulating dealings in stocks on a margin.

Otis vs. Parks, 187 U. S. 606;
Brodnax vs. Missouri, 219 U. S. 285;
Gatewood vs. North Carolina, 203 U. S. 531.

Or regulating the business of banking.

Noble State Bank vs. Haskell, 219 U. S. 104;
Abilene National Bank vs. Dooley, 220 U. S. 1;
Engel vs. O'Malley, 219 U. S. 128;
Schaake vs. Dolley, 85 Kansas 598.

Or regulating employment agencies.

Williams vs. Fears, 176 U. S. 270, 275;
People vs. Brazee, 183 Mich. 259;
Brazee vs. Michigan, 15 Advance Opinions, 561.

Or regulating sales of goods in bulk.

Kidd, Dater Company vs. Musselman Grocer Company, 217 U. S. 461;
Lemieux vs. Young, 211 U. S. 489.

Or regulating the sale of oleomargarine.

People vs. Freeman, 233 Ill. 373;
People vs. Rotter, 131 Mich. 250;
Boyle vs. Pennsylvania, 127 U. S. 678.

Or regulating the size of loaves of bread.

People vs. Wagner, 86 Michigan, 594.

On regulating the stopping of trains.

L. S. & M. S. Ry. Co. vs. Ohio, 173 U. S., 285.

Or fixing a license fee upon an occupation.

Banta vs. City of Chicago, 172 Ill., 204.

Or determining Employers' liability.

C. B. & Q. Ry. vs. McGuire, 219 U. S., 578.

Or regulating the use of trading stamps.

Rast vs. Van Deman & Lewis, 240 U. S., 242;
Tanner vs. Little, 243 U. S., 369;
Pitney vs. Washington, 240 U. S., 387.

Or regulating insurance companies.

German Alliance Insurance Co. vs. Kansas, 233 U. S., 389.

The cases of *Rast vs. Van Deman & Lewis,* 240 U. S. 342, and *Tauner vs. Little,* 240 U. S. 369, which may be thought at first to have pricked out a new boundary of the police power, in reality rest upon a familiar rule. The Court declares that the trading stamp scheme "may not be called in an exact sense a 'lottery,' may not be called 'gaming,' it may, however, be considered as having the seduction and evil of such."

Rast vs. Van Deman & Lewis Company, supra, at page 365.

II

Interstate Commerce.

THE STATE IN THE EXERCISE OF ITS POLICE POWER HAS NO RIGHT TO PROHIBIT INTERSTATE TRADE IN LEGITIMATE ARTICLES OF COMMERCE. STOCKS, BONDS AND SECURITIES, AS DEFINED BY THIS ACT, ARE LEGITIMATE ARTICLES OF COMMERCE. THE TRAFFIC IN THESE ARTICLES BETWEEN TWEEN CITIZENS OF THE SEVERAL STATES IS INTERSTATE COMMERCE. THIS LAW PROHIBITS, BURDENS AND REGULATES THIS TRAFFIC AND IS, THEREFORE, IN CONFLICT WITH THE CONSTITUTIONAL PROVISION.

Stocks and bonds are articles of commerce.

The word "commerce" is not defined in the Constitution of the United States and has been said not to have any juridical meaning, but it is "a term of the largest import." It includes traffic by the purchase, sale and exchange of commodities and the transportation of persons and property by land and water. *Calvert, Regulation of Commerce,* citing *Welton vs. Missouri,* 91 U. S., 275, and other cases.

The term "commerce" received its first definition in *Gibbons vs. Ogden,* 9 Wheaton, 1. It was there said that "commerce is undoubtedly traffic; but it is something more, it is intercourse."

Under these broad definitions it would appear certain that stocks, bonds and securities which seem to be the very

vehicles of all modern trade and business, must be articles of commerce within the meaning of the Constitution. Such is in our opinion the doctrine of this Court.

The earliest case discussing this question is that of *Nathan vs. Louisiana,* 8 Howard 73. This case dealt with a tax by Louisiana on the business of issuing foreign bills. The Court said:

> "A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable."

The tax in the Nathan case was levied on the business. In the Michigan Blue Sky law the restriction is not on the business of selling stocks and bonds as a business. It affects, it is true, the "dealer" engaged in the sale of securities as a business but the vital principle of the law is the regulation of the *issue* sale of the securities.

In the Nathan case it was a tax the validity of which was in question. Here the law does not merely tax. It prohibits. In that case the tax was not levied on a bill of exchange moving in interstate commerce. Here interstate commerce in certain securities is prohibited. There the article subjected to the restrictions of the law was a note "ordering the payment of money." Here it is a thing of determined value, a chattle bought and sold and moving everywhere in commerce and trade.

The Nathan case was followed by *Paul vs. Virginia,* 8 Wallace 168, where court discussed a State statute providing for a State license of an insurance company and

held that the issuing of a policy of insurance is not a transaction of commerce. Justice Field said:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

The relation of insurance to commerce was again before the court in *New York Life Insurance Company vs. Deer Lodge County*, 231 U. S. 495, and the court again held that a policy of insurance was not an instrument of commerce. After reviewing the cases, the Court said:

> "A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event * * *."

> "It is contended that the policies are subject to sale and transfer, may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation, a use by the insured, not by the insurer."

We submit that there is a clear distincton between the executory insurance contract and the executed, valuable, vendible commodiy, the stock or bond. We can see some similarity between the process of issuing the certificate of stock and delivering it to the subscribing stockholder and the issue and delivery of an insurance policy but the transfer and sale of the issued certificate, like the pledge of the insurance policy by the insured, is an entirely different transaction. It is commerce in a vendible and valuable property. In other words the bond or the certificate of stock represetns a present executed contract right, a commodity passing freely from hand to hand and carrying value. It is vendible and confers valuable rights on its holder. These characteristics are not possessed by the insurance contract which has not yet been delivered to the insured.

The question at bar was however conclusively dealt with in the *Lottery Cases*, 118 U. S. 321. There the Court carefully considers its earlier decisions and elaborately discusses the question of what is and what is not an article of interstate commerce, and as well the general question of the scope of the phrase, "commerce among the states." Judge Harlan points out that "commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph."

The Lottery Cases dealt with the constitutionality of an act of Congress to suppress the lottery traffic. It was in-

sisted that the sending of lottery tickets in interstate commerce did not constitute or evidence any transaction belonging to interstate commerce. The Government argued that lottery tickets, "title to which passes by delivery and which, from time immemorial, have been subjects of barter and sale are articles of commerce." The court gives the broadest interpretation to the word "commerce." Upon the direct question as to whether the lottery tickets were subjects of commerce, the court said, p. 353:

> "It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize, at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the

> drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895, 28 Stat. 963."

The dissenting opinion in this case was written by the Chief Justice and in the discussion of the question whether or not lottery ticket is an article of commerce, he reduces the problem to the question of whether or not the lottery tickets create a present contractual relation and whether or not they are vendible. He insisted that a lottery ticket is contingent in its nature, as is an insurance policy, and that it is not vendible.

The doctrine of the dissenting opinion, therefore, when applied to stocks and securities, has no force, since both a share of stock and a bond represent a completed contract. It is not contingent. It gives a present right and is vendible. One of the reasons why the defendants seek to sustain this law is because such stock and bonds are vendible to a degree.

In *Hatch vs. Reardon*, 204 U. S., 152, an earnest argument was made by eminent counsel against the constitutionality of the New York tax on the transfer of stock, and it was urged that the tax was void, among other reasons, because it violated the commerce clause of the United States. The Court declined to pass upon this question, saying that the case did not indicate that the parties were engaged in interstate commerce. The Court, however, did make the significant remark that "the immediate object of sale was the certificate of stock present in New York. That document was more than evidence, it was a *constituent of title*. No doubt, in a more remote sense the object was the membership or share which the certificate conferred or made attainable." The Court, therefore, declined to consider the question of whether or not a sale of

stock made by a resident of one state to a resident of New York, the stock passing from the first state to the second, was a transaction of interstate commerce. It did seem to indicate by its comments upon the fact that the certificate of stock was a "constituent of title," that if there had been such a sale, it would have been within the protection of the commerce clause and the law would have been bad unless it could be justified as a tax measure.

The case of *Engel vs. O'Malley*, 219 U. S., 128, upheld the Private Banking Act of New York. It was urged that this act violated the commerce clause of the constitution, but the Court declined to discuss this proposition insisting that there was no transaction in interstate commerce shown by the record. It did not discuss the question as to whether or not, if money had been received by the private banker and forwarded out of the state, it would be interstate or foreign commerce. The court said:

> "The law * * * was passed for the purpose of regulating and safeguarding the business of receiving deposits, which precedes and is not to be confounded with the later transmission of money, altho leading to it."

Here, again, the transaction held not to be interstate commerce is not identical with that set up in the case at bar.

The bill here recites that there is interstate commerce in stocks and bonds in Michigan. The owners transmit them to the purchaser in Michigan through the mail or otherwise and payment is made to the owner in the foreign state of his residence.

If a lottery ticket, which confers only a possible right upon the owner to participate in a fund, is to be held an article of commerce, why should not a certificate of stock

be likewise an article of commerce? It represents an actual value. It creates a present property right and it is a constituent of title. It is dealt in. It is a subject of trade and barter. It is vendible. The distinction that it passes through the mail, as was suggested in the Nathan case, is of no value, since all classes of property now pass through the mails. Certificates of stocks and bonds travel by express, as well as by mail. In many instances, their title passes by delivery, as does the title to other personal property.

Bills of lading have been held to be article of commerce. *Almy vs. State of California*, 24 Howard 169. How much more should a bond be an article of commerce when the sale thereof can be consummated by delivery and when it is, according to modern commercial usage, handled, taxed and treated as a thing of value.

We respectfully submit that to hold that the stocks and securities of the character described in the Michigan Act are not articles of commerce runs counter not only to the law, but as well to the theory of modern business and to all the practices of modern finance.

(b) *The State in its police power cannot burden interstate commerce in legitimate articles of such commerce. Stocks and bonds are such legitimate articles.*

The language of the Court in *Simpson vs. Shepard*, 230 U. S. 352, is pertinent here.

After explaining that the power of Congress to regulate commerce of the several states is supreme and plenary, "it is complete in itself, may be exercised to its utmost extent and acknowledges no other limitations than are prescribed by the constitution," the opinion proceeds to set forth "what the states cannot do."

> "The states are not permitted directly to regulate or restrain that which by its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. * * * They have no power to prohibit interstate trade in *legitimate articles of commerce.*"

There can be no doubt but that stocks, bonds and securities are legitimate articles of commerce. In our view, the words "legitimate articles of commerce" mean no more than if the court had said, "Lawful articles of commerce" or, indeed, "articles which belong to commerce," or, again, "commercial articles"; "undoubted articles."

In the case of *Bowman vs. Chicago etc. Ry Co.*, 125 U. S. 465, 489, the Court had the following to say, quoting from the opinion of Justice Catron in the *License Cases*, 5 Howard 504, 599:

> "The assumption is, that the police power was not touched by the Constitution, but left to the States, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of foreign commerce, or of commerce among States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence, or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words, is not a commer-

cial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United State. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of *Gibbons vs. Ogden, Brown vs. The State of Maryland*, and *New York vs. Miln.*"

Again in the same case, quoting from *Railroad Co. vs. Husen*, 95 U. S. 465, 472, the Court said:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * *

The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. * * * The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects

> not within its scope, cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range is sometimes very near to the field committed by the Constitution to Congress, it is the duty of the Courts to guard vigilantly against any needless intrusion."

So in *Crutcher vs. Kentucky,* 141 U. S. 47, 60, 61, the power of the state over "deleterious or injurious" articles was recognized but it was said that "it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress."

But the Blue Sky Law in question in this case can neither be classified as a sanitary measure or a quarantine law. It is not an inspection law as we have already pointed out.

Does the possibility of fraud in the sale of the security compel a different conclusion? It must be remembered that the fraud cannot be consummated until the sale is completed. It is not inherent in the certificate of stock itself. It is the composite result of the representation of the seller, the character of the security sold, the price, and the knowledge of the buyer. The "inspection" therefore of the article of commerce can give no indication as to the evil the statute is said to be intended to prevent.

For this reason the statute provides, not for an inspection of the article transmitted in interstate trade, but for an examination of the property as to which the security is given, prior to the negotiation of that security. This examination values that property and in actuality fixes the price upon the security. "Inspection" is not a proper word to apply to this process. But whatever it may be called it recognizes that the article of commerce with which it deals, that is the bond or stock, is entirely different apart from the "deleter-

ious" articles of commerce subject to State regulation and inspection.

The Provisions of the Act Constitute a Substantial Burden on Interstate Commerce and the Act is Therefore Void.

But even if the law be sustainable as within the police power, still it does so *directly* burden interstate commerce as to be invalid for that reason, that is, invalid so far as interstate commerce is concerned. In other words, to paraphrase the language of the opinion of the lower Court there may be a field for the exercise of the police power legitimate from all other points of view and yet forbidden as against interstate commerce and this law lies within that field.

Says Prof. Willoughby in his work on the Constitution, p. 664:

> "In the exercise of these powers it is often the case that interstate and foreign commerce are indirectly and even substantially affected. But in no case can regulation of interstate and foreign commerce be the direct or primary aim of the State's action. If this is the aim or effect, no support for the validity of the law may be obtained by calling the law a police regulation."

Yet the direct and primary aim of this statute is the regulation of interstate commerce. It is insisted by the State that the law is intended "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other fraudulent organizations." The State of Michigan guards its own corporate organization with the greatest care. Under its statutes only tangible values can be capitalized. It is not its local corporations or its local stocks and securities which are the real object of this law's solicitude. It is rather the dealings in Michigan in the

foreign securities at which the law strikes. Such dealings can hardly be separated from interstate commerce.

But even if it be not directed at interstate commerce, it still may substantially prohibit or burden that commerce. As we have said, if the statute has no justification in the police power it is surely not only a burden on interstate commerce but an unjustifiable burden as well, and even if it is within the police power of the state it may be still a direct restraint on interstate business.

Let us again inquire as to its restrictions.

The law absolutely prohibits the issue and sale of all stocks, bonds and securities as there defined for a period limited only by the will of the Commission. Can it be said that this restriction is, to use the language of *Railroad vs. Husen, supra* within "the necessity for its exercise," that is the exercise of the police power? Can the Court say that fraud is so prevalent in the sales of securities or the borrowing of money on bonds and mortgage and secured paper, that an admittedly honest transaction can be for one hour suspended and for that purpose the domain of the federal government can be thus invaded?

But there are other direct and substantial burdens on interstate trade. A "license" fee is to be exacted on every security offered.

The cases of *Crenshaw vs. Arkansas*, 227 U. S. 389, *Rogers vs. Arkansas*, 227 U. S. 409, and *Adams Express Co. vs. City of New York*, 232 U. S. 14, dealt with a state requirement for a license to conduct interstate business. They are now directly in point because this law prohibits a dealer doing business with a *license* (See Section 11).

In the *Crenshaw* case the Court declared a license law void at the suit of one who did an interstate business.

In *Adams Express Co. vs. New York,* 232 U. S. 14, the Court dealt with an ordinance requiring a license of express drivers. The opinion says:

> "Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith vs. Alabama,* 124 U. S. 465; *Hennington vs. Georgia,* 163 U. S. 299; *N. Y., N. H. & H. R. R. Co. vs. New York,* 165 U. S. 628; *Lake Shore & M. S. Ry. Co. vs. Ohio,* 173 U. S. 285. It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license. *Crutcher vs. Kentucky,* 141 U. S. 47, 58; *Robbins vs. Shelby County Taxing District,* 120 U. S. 489, 496; *Leloup vs. Mobile,* 127 U. S. 640, 645; *Stoutenburgh vs. Hennick,* 129 U. S. 141, 148; *Rearick vs. Pennsylvania,* 203 U. S. 507; *International Text Book Co. vs. Pigg,* 217 U. S. 91, 109; *Oklahoma vs. Kansas Natural Gas Co.,* 221 U. S. 229, 260; *Buck Stove Co. vs. Vickers,* 226 U. S. 205, 216; *Crenshaw vs. Arkansas,* 227 U. S. 389; *Minnesota Rate Cases,* 230 U. S. 352, 401. As was said by this Court in *Crutcher vs. Kentucky,* 141 U. S. p. 58, 'a state law is unconstitutional and void which requires a party *to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it?*'"

The requirement that the foreign investment company and the foreign dealer must appoint an agent for service of process is likewise a direct and substantial burden.

In the case of *Sioux Remedy Co. vs. Cope*, 235 U. S. 197, the State of South Dakota required the foreign corporation to subject itself to jurisdiction in all the courts of the state before it could sue to enforce a contract arising out of interstate commerce. In the Blue Sky law a foreign corporation must subject itself to the jurisdiction of the state courts before it can make a delivery of securities in interstate commerce. The South Dakota statute was defended as within the police power of the state. The State Court held it to be a reasonable exercise of the police power. The United States Supreme Court denied this.

> "It may be conceded in a general way that a State may restrict the right of a foreign corporation to sue in its courts. *Bank of Augusta vs. Earle*, 13 Pet. 519, 589-591; *Anglo American Provision Co. vs. Davis Provision Co.*, 191 U. S. 373. And in the same general way it may be conceded that a State may restrict the right of such corporations to engage in business within its limits. *Paul vs. Virginia*, 8 Wall. 168; *Hooper vs. California*, 155 U. S. 648. But the power so to deal with these subjects, like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state action. *Missouri vs. Lewis*, 101 U. S. 22, 30; *Blake vs. McClung*, 172 U. S. 239, 256; *Chambers vs. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148; *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1,, 33; *Southern Railway Co. vs. Greene*, 216 U. S. 400, 413. One of these limitations is that before indicated arising from the commerce clause, whose operation, as this

Court has said, is such that a corporation authorized by the State of its creation to engage in interstate commerce 'may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce.' *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1, 27. We think that when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the State cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled."

We conclude therefore that the Act is a direct burden on interstate commerce and also that if it is not such a direct burden it is yet so burdensome and so unreasonably restrictive that it is in conflict with the Commerce Clause of the Constitution and therefore void.

III

The Statute Is Void Since It Vests Arbitrary Power in the Commission.

The third main objection to the Act relates to the arbitrary power granted the Commission. It is a reiteration of the general objection that the Act is unreasonable in its restrictions and so beyond the police power, but it goes beyond that. It inquires whether the state can set up a Commission vested with executive, legislative and judicial authority which can arbitrarily determine the right to do the acts there described. The *opinion* of the Commission that the sale of the securities will work a fraud is the standard for the determination of the right of a citizen to issue and sell securities. We refer to the action of the Commission as arbitrary because it is not based on a finding that fraud exists. It is an *opinion* of a possibility or probability of future fraud. "Broader or vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds or securities hereafter to made in Michigan." *Alabama Transp. Co. vs. Doyle et al* 210 Fed. 173.

That there must be primary standard in the law for the action of the Commission is settled by many cases.

The rule was laid down in the case of *Yick Wo vs. Hopkins, Sheriff*, 118 U. S. 356, where an ordinance was held void which made it unlawful for any person to maintain a laundry in a frame building in San Francisco without first obtaining a permit from the board of supervisors. The opinion is in part as follows (p. 366):

"There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. *The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.*"

This doctrine has been repeatedly confirmed. We do not intend to cite all the cases dealing with it, but certain of them deserve attention.

In *United States vs. Grimaud*, 220 U. S. 506, the Secretary of Agriculture had made a rule requiring permits for grazing stock on a public reserve. It was objected that this was a delegation of legislative power. But the court declared that the general rule had been laid down in the statute. The object of the reservation was stated in the law, and the secretary had authority to supplement it by appropriate special regulations.

In *Red "C" Oil Mfg. Co. vs. Board of Agriculture*, 222 U. S. 380, the legislature required that illuminating oils be

safe, pure and afford a satisfactory light. It was left to the Board of Agriculture to determine what oils would measure up to these standards. The Court said, "We think a sufficiently primary standard was established and that the claim that legislative powers were delegated is untenable."

But where is the primary standard here? What general rule is there laid down in this statute? Its language is:

> "If said Commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities *would in the opinion* of said Commission work a fraud upon the purchaser, etc."

Aside from the finding that the securities are fraudulent, the test is *the opinion* of the Commission that the securities *will* work a fraud.

It is the *opinion*, not the fact, that is the basis of the ruling. It is the *probability*, not the actual presence of fraud, which is here the test. Surely here is no "primary standard," but a clear delegation of arbitrary authority. For if the Commission declares that in its opinion fraud will result, where is the relief? It cannot be objected that fraud will not result, because it is the *opinion* which is the final test. And as to the probability, there can be no proof, only an opinion.

In *Schaezlein vs. Cabaniss*, 135 Cal. 466, the statute gave the labor commissioner power to direct the installation of a mechanical contrivance in factories where "dust, filaments or injurious gases are generated or produced that are *liable* to be inhaled by the persons employed therein." The Court condemned the statute, saying in part:

> "Nor does it matter if the condition of such a workshop be reasonably wholesome for the use of

> the operatives, if 'dust, filaments, or injurious gases' are 'liable to be inhaled' (and *it is here the liability, and not the fact, of the inhalation which invites the action* of the Commission), and if, *in the opinion of the commissioner, such liability* to inhalation could 'to a great extent' be prevented, he may designate and prescribe the kind of appliance which in his judgment is suitable for such purpose, and it must be employed."

It is pertinent here to refer to the exemption of the so-called "Manual" securities.

The law provides that any security listed in a "so-called Manual of Information" is exempted from the operation of the statute. The theory is that this listing in a "Manual" certifies that the investment company is not fraudulent and that the sale of its security will not work a fraud. There is no question but that these Manuals do not pretend to certify even the solvency of the concerns advertising in their pages. Much less do they pretend to say whether or not the securities there listed may not be sold under circumstances which will work a fraud on the purchaser.

The wholesale approval of the Manual is therefore a delegation by the Legislature, not to the Commission, but to the publisher of the Manual, of the arbitrary power to permit the sale of the security in Michigan. There is here no finding of any kind whatever nor any action by the Commission. The purchase of advertising space will give the stocks and bonds the same standing and approval as the formal finding and approval of the Commission.

In discussing this question of delegation of arbitrary power, we make no question of the right of the Legislature to delegate certain powers to an administratrive commission. But we insist that there must be a "primary stand-

ard" for the Commission's action. The probability that some evil will arise in the future is not such a standard.

We have carefully read the brief for the appellants but we find in it no reference to the undoubted fact that the final test of the law in question lies in the opinion of the Commission that fraud will probably result from the sale of the securities. Frequent reference is made to the finding of the Commission that fraud exists, and as to whether "the issue is fraudulent or not." We do not quarrel with the proposition that a delegation of the Commission to determine actually existing fraud would set up a sufficient standard in the law so that it could be defended against the objections that an arbitrary power had been conferred. But it is with the delegation to the Commission and to the publisher of the Manual of the power to determine according to its opinion that fraud will probably result, that we disagree. It is this attempt to confer arbitrary power which the learned Attorney General does not refer to nor attempt to sustain.

IV.

The Title To the Act Covers More Than One Object and Does Not Express the Objects Set Forth In the Statute.

Section 21, Art. 5 Constitution of Michigan:

> "No law shall embrace more than one object, which shall be expressed in its title."

The title to the Blue Sky Act defines the purpose of the Act as the prevention of "fraud in the sale and disposition of stocks" etc., by requiring an inspection etc., and regulation and supervision, etc.

Its language, however, is confusing. It will be noted that it is "to prevent fraud in the sale of securities by any dealer, firm, company, association," etc., by requiring an inspection etc. and such regulation and supervision of the business of *said persons, firms*, etc. *Persons* must refer to *dealers* who sell securities. The language does not indicate an intent to regulate *persons* who *issue* securities. In fact it is difficult to read into the title any reference except to dealers. The use of the words *"including dealers and agents"* is the only thing to indicate a broader scope than the regulation of dealing in securities. And the body of this Act clearly covers *persons* who issue securities since it covers all those who issue as well as those who deal in the securities there defined.

There are in it, however, other provisions which do not square with this title.

Is the provision authorizing the Commission to appraise the investment company's property within the meaning of

the words of the title? The title covers "inspection" and "supervision." The power, however, to compel the surrender of stock already issued and the consequent amendment of the company charter, if that power exists, surely is not described in a title which indicates only supervisory powers.

Would one reading the title to the Act suppose that it prohibited the sale of securities which are not fraudulent but which had been issued in payment of property taken at a price which was in the opinion of the Commission beyond its real value?

Would any one suppose that it gave the Commission authority to prevent the sale of stock by one holder unless a proportion of the stock of the other holders thereof was given up and cancelled, even though such other holders did not desire to sell stock in Michigan?

There is nothing in the title to indicate that a newspaper is to be punished in a criminal action if it publishes certain advertisements.

The Act requires that all the books of accounts of the investment company shall be open to "stockholders and investors in said Company." Where is the suggestion in the title that the law contains this enlargement of the rights of stockholders and investors, whoever the word investors may be taken to include?

The title to the Act refers to the repeal of the 1913 statute. The Act itself repeals this law but preserves the proceedings pending hereunder. Does the title indicate this sufficiently?

The title says nothing as to the creation of a Commission to administer the law. Does the reference to inspec-

tion and regulation sufficiently include and sufficiently indicate the creation of such a Commission?

We do not think it can be said of this Act that "the broad language of the title is capable of a construction which will cover all the provisions of the Act." *Alabama Transp. Co. vs. Doyle*, 210 Fed. 173.

V.

The Statute is Class Legislation and is Therefore Void.

The principle which controls the question of class legislation is well known. It was succinctly stated in *Richie vs. Wayman,* 241 Ill. 549, as follows:

> "A law which is made applicable to only one class of citizens, however, must be based upon some substantial difference between the situation of that class and other individuals to which it does not apply."

With this rule in mind, let us examine the statute under discussion. Are the business enterprises exempted from the operation of this act any different in character, so far as the purpose of this act is concerned, than those to which the act applies? Are the securities exempted from the operation of this act any different, so far as the purpose of this act is concerned, from those to which the Act applies?

The 1913 Act was criticized because of the evident discrimination between individuals and partnerships and between long and short time paper, between ordinary mortgages and trust mortgages, etc.

Some attempt has been made to correct these defects. The 1915 law now refers (Section 2) to the individual person. But other discriminations have appeared.

In the effort to eliminate the objection made as to the inclusion of long time commercial paper in the 1913, "*unsecured commercial paper*" has been exempted. This

makes a still greater discrimination. It immeasurably broadens the scope of the Act and makes it interfere with ordinary commercial business far more than did the 1913 Act. What is "secured commercial paper" or "unsecured commercial paper"? Secured commercial paper in the ordinary commercial phrase includes paper secured by the deposit of collateral and papers secured by endorsement. Practically all commercial paper taken by banks is secured and so within the language of the Act. There is a class of commercial paper sold by brokers to banks—paper of large mercantile and manufacturing concerns—which may not be endorsed or secured in any way, and this, by the way, would come the nearest to that which the Commission might wish to regulate. But the ordinary paper handled by the banks, the vast volume of acceptances and trade notes given by mercantile and manufacturing houses, this all comes to the bank and the money lender with security either by way of collateral or endorsement. Why should this be covered by the Act and the unsecured paper be not covered? If any paper needs regulation it would seem that which has no security.

This anomaly of the law is of sufficient importance to justify the condemnation of the court.

The Act excludes securities of "any domestic *corporation organized without capital stock and not for pecuniary gain or* exclusively for educational, benevolent, charitable or reformatory purposes."

With this exemption in the Act a corporation so organized may issue bonds and sell them without compliance with the law. Granted that the proposed regulation is necessary, what is the distinction, so far as the purchaser of the security is concerned, between the corporation organized for profit and that organized not for profit? The test under the law, at least so reads the title, is the fraud

in the *security*. How is the purpose of the corporation of any assistance in determining that question?

The law exempts *mortgages* on property within this State when the entire debt is sold with the mortgage. But where the mortgage is on the property without the State the law applies even though the whole debt is sold with the security.

The law exempts securities listed in *"Standard Manuals of information."*

Yet these so-called "Manuals" do not attempt to furnish the information required by the Commission of the investment companies. They, of course, connot deal with the representations made by any one who attempts to sell any security listed therein. The exemption, therefore, of securities listed in the "*Manuals*" is a gross discrimination against securities not so listed. It amounts to a suggestion that advertising space be purchased in these directories. A corporation unwilling to pay the "Manual" fee is subject to the inconveniences of the Act and may be prevented from selling its securities though, if it subscribes to the "Manual," it has the open sesame to do business in Michigan.

The Act forbids *"taking subscriptions for"* stock unless there is compliance with its terms. But it exempts *stock dividends*. Very evidently the character of a stock dividend was misunderstood. A stock dividend is effected by the declaration of a property dividend. The stockholders then waive their right to the property and consent to take stock. The transaction in its essentials is equivalent to a stock subscription to be paid in property. There can be no justification in drawing a distinction between them.

VI.

The Act Delegates to the Michigan Securities Commission Legislative Authority. It is Therefore Contrary to the Provisions of the Constitution.

We have already discussed this subject insofar as it deals with the arbitrary power given to the Commission.. But apart from the question of whether or not this arbitrary power in the Commission is unreasonably destructive of private rights there is, of course, the problem of whether or not legislative power has been delegated to the Commission. Insofar as we can separate this phase of the problem we desire now to invite to it the Court's attention.

The functions of the Securities Commission are various. They combine the administrative, judicial and the legislative. It is an administrative board in its examination of investment companies. It is a judicial body insofar as it finds whether or not the proposed plan of business of the Investment Company is fraudulent or whether its securities are fraudulent or of such a nature that their sale would, in the opinion of the Commission, work a fraud.

Is there any standard set up in the law by which this finding of the Commission can be measured? Without it the Commission must itself exercise legislative power. That such a standard is necessary is settled by the decisions we have already examined. "The power conferred on the legislature to make laws," says Cooley, 7th Ed. 163, "cannot be delegated by that department to any other body or authority." See also the following cases:

Yick Wo vs. Hopkins, Sheriff, 118 U. S. 356;

U. S. vs. Grimaud, 220 U. S. 506;

Schaezlein vs. Cabaniss, 135 Cal. 466;
Red "C" Oil Mfg. Co. vs. Board of Agriculture, 222 U. S. 380.

In *Dowling vs. Insurance Co.*, 92 Wis. 63, in dealing with a statute which intrusted to the Insurance Commissioner the power of framing the standard insurance policy, the Court said:

> "The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law, in all its details, *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event."

In *State vs. Burdge*, 95 Wis. 397, the Court had before it the rule of a board of health excluding from the public schools children who had not been vaccinated. No statute had been passed compelling vaccination. The Court said:

> "The making of such rules and regulations is an administrative function, and not a legislative power, but there must first be some substantive provision of law to be administered and carried into effect. The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and

in pursuance of the law.' The first cannot be done. To the latter, no valid objection can be made."

In statutes dealing with the delegation of powers to boards to issue licenses, a standard of proficiency has been set, else the law has been held bad.

In *Harmon vs. State*, 66 Ohio St. 249, the language of the statute was:

> "If, upon examination, the applicant is found trustworthy and competent."

It was said that each examiner might "have his own notions as to what shall contitute an applicant 'trustworthy and competent.' "

A Kentucky statute authorized a state board to revoke the license of a physician for "grossly unprofessional conduct of a character likely to deceive or defraud the public." This act was held bad because no standard had been prescribed to determine whether such conduct was or was not unprofessional.

> *Mathews vs. Murphy*, Ky. Court of Appeals, 63 S. W. 785.

In the opinion of the lower Court on the 1913 Statute, it was said:

> "Of like effect and subject to like infirmity is the provision forbidding the sale of securities, if the Commission thinks the Company's organization or proposed plan of business is not 'fair.' Broader and vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds or securities hereafter to be made in Michigan."

This language applies as aptly to the provision in the present law forbidding the sale of securities which in the *opinion* of the Commission will work a fraud. There might be said to be an indefinite standard in the word "fair," but when the *opinion* of the Commission is substituted for a finding as to existing facts there is surely a delegation of the Legislative authority and power.

VII.

The Statute Attempts to Confer Upon the Michigan Securities Commission Judicial Powers. It is, Therefore, in Violation of the State of Michigan.

But whether a standard has been set by the legislature or is to be fixed by the Commission, the application of the statute and that standard to any particular state of facts calls for a judicial determination. There must be a judicial determination of whether or not a given investment company or a given security is fraudulent or whether or not the sale of the security will in the opinion of the Commission work a fraud.

Under the statute the Michigan Securities Commission must determine, as a Court, what are the facts in connection with the plan of business, the articles of association and by-laws of a corporation and find whether the same are fraudulent or will work fraud. There is, therefore, an admitted creation of judicial authority in the Commission.

In the case of *Chandler vs. Nash*, 5 Mich. 409, Judge Christiancy had under consideraton a statue which gave a notary public power to hear and determine questions both of law and of fact. He laid down the rule that so long as the constitution vested the whole judicial power in the Courts and officers named in that instrument, it could not be conferred upon any others.

In *Andrews vs. Judge of Probate*, 74 Mich. 278, the Court had under consideration an act which provided for the naming of a board of examiners of elections. The Court said:

> "If it (the act) confers judicial powers on the Board of Examiners, to that extent it is invalid. The Constitution vests the judicial power in certain specified Courts, and it cannot be legally vested elsewhere. If this act confers upon the Board of Examiners authority to investigate and adjudicate upon any fraud in the election, it cannot be sustained in that respect."

If there was any doubt hat it was intended by the statute that this Commission should be a judicial body clothed with power to judicially determine as to the specific matters above set forth, it is removed by the provisions of Section 22, which provides a review of the findings and orders of the Commission upon a writ of certiorari direct to the Supreme Court of the State.

> "Certiorari does not lie to review acts which are *not done in the exercise of judicial power* or authority but are merely ministerial, executive or legislative in their character."
>
> *Root vs. Barnes*, 1 Mich. 37;
>
> *6 Cyc. of Law and Procedure*, 753.

VIII.

CONCLUSION.

The Law Cannot Accomplish Its Purpose and Finds No Justification in General Business Conditions Nor in the Fact That Similar Statutes Have Been Passed in Other States.

Of what real efficacy can a law be which rests its test or standard on probabilities and the unregulated opinion of an administrative commission. This commission assumes to examine and regulate every form of business, every kind of security, barring only those specifically excepted by the Act. It assumes to probe the intentions of the issuers and sellers of these securities and to determine whether they will in the future deceive the purchasers. Manifestly one can falsify as to the value of a valuable security as well as that of a valueless one. It proposes to determine how far the purchasers even of a doubtful security will be defrauded. Even if the doubtful security may be thereafter bought on an honest statement by a wary and fully informed buyer, still if the Commission's opinion is that fraud will arise an honest sale is forbidden.

And it is physically impossible for the Commission to examine all the securities issued and offered for sale. Omniscience alone would enable it to do its full legal duty. Only by a resort to the provision as to the Manuals can any progress be made. For the act would, of course, be entirely impossible of execution if it were not for this provision exempting securities listed in the so-called "Manuals." All the great mass of securities already issued are at once approved without information to or examination by the

Commission. An advertisement becomes as efficacious as a comprehensive report to the Commission and an investigation and appraisal of the applicant's property.

These objections, however, go mainly to the provisions of the law and not to its basic principle. That rests as we have already urged upon a false conception of business dealings and commercial practises. They are not generally or essentially fraudulent.

Nor does the fact that in many states, led on by the catch-word "Blue Sky," hysterical legislatures have attempted to write these laws upon the statute books. They may or may not be open to the same objections as this one in Michigan. It is, however, interesting to note that wherever a similar statute has been presented to the Courts it has been condemned. Those which have been sustained differ radically and essentially from the Michigan law.

Wm. R. Compton Co. vs. Allen, 216 Fed. 537;
Bracey vs. Darst, 218 Fed. 482;
Ex parte Taylor, 68 Fla. 61;
Standard Home Co. vs. Davis, 217 Fed. 904.
Geiger-Jones Co. vs. Turner, 230 Fed. 233.

We respectfully submit that the law is unconstitutional and should be so held.

HAL H. SMITH,
Attorney for Appellants, Weis Fibre Container Corporation, et al.

MERRICK ET AL. *v.* N. W. HALSEY & COMPANY ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 413. Argued October 16, 17, 1916.—Decided January 22, 1917.

The Michigan "Blue Sky Law," Act No. 46, Public Acts, 1915, p. 63, is the same in principle as the laws of Ohio and South Dakota, involved in *Hall* v. *Geiger-Jones Co.*, *ante*, 539, and *Caldwell* v. *Sioux Falls Stock Yards Co.*, *ante*, 559, and is sustained over constitutional objections for the same reasons.

Whether the dealing in stocks and other securities, or sale of their own issues by corporations, require governmental regulation for the prevention of fraud, and whether such regulation should be by executive control or otherwise, are questions for the state legislature, and unless its judgment in these regards, or the execution of it, be palpably arbitrary, the courts will not interfere.

It is not a function of this court to pass upon the expediency or adequacy of legislation.

The purpose of the Michigan statute is to protect investors in securities not from financial loss generally but from fraud.

In prevention of fraud, the regulatory power of a State is not necessarily confined to those classes of business which by their nature or as generally conducted involve or encourage fraud; it may extend to those in which fraud usually, when it arises, is occasional and

confined to individual transactions, but which may nevertheless be conducted for fraudulent purposes.

The limitations of the Constitution are not so rigid as to render state legislation inadequate to the changing conditions of life.

Section 3 of the Michigan act, which exempts from its operation securities "listed in any standard manual of information" approved by the securities commission, *held*, not to render the act unduly discriminatory or involve unlawful delegation of power.

The act complies with the requirement of the Michigan constitution that no law shall embrace more than one object, which shall be expressed in its title.

228 Fed. Rep. 805, reversed.

THE question in the case is the validity of the Blue Sky Law (using this designation for convenience) of the State of Michigan. The law is almost identical with that of South Dakota, which is the subject of the decision in No. 386, *ante*, 559. The pleadings are elaborate and practically defy synopsis. There are direct complainants and intervening complainants, expressing the grievances of dealers in the State and outside of the State, and of persons who would like to be dealers in the State but are deterred, they allege, by the expense of the undertaking. The law, therefore, is assailed from all points and in all aspects.

The original bill includes in it as parties corporations, individuals, co-partnerships, residents and citizens of different States, all engaged in the investment banking business and in the business of buying and selling stocks, bonds and other securities, and offering them for sale in Michigan and who have contracted from time to time to sell such securities for the owners thereof and for the issuers thereof. They have expended large sums of money in advertising their business and have a valuable good will and an extensive clientele and have acquired valuable information as to the conduct of their business and as to the names and addresses of persons, firms and corporations who buy the designated securities in Michigan. They send into the State their agents and employees, who there

solicit orders for the securities and transmit such orders to complainants, at Chicago, Illinois, which orders are accepted and the securities so purchased are transmitted to Michigan. Their representations of the securities are true representations, they allege, and that they have been solicited to sell and have contracted to sell them, but have been informed that they cannot be permitted to sell them without complying with the Michigan statute.

The various provisions of the statute are set out, with details as to the manner of its operation; the irrelevancy of it is asserted, the useless labor of it—in some cases the impossibility of it—and in other cases its unreasonableness; and it is further asserted that its exaction of matters of confidence and its requirements invade and destroy property rights, curtail freedom of contract and otherwise seriously damage complainants' business and property. All of this is alleged with industrious and elaborate detail.

The other charges of invalidity against the act are: (1) It is in violation of the constitution of Michigan, which provides that no law shall embrace more than one object, which shall be expressed in its title, with specifications. (2) It offends against the Fourteenth Amendment of the Constitution of the United States, especial stress being put upon the exceptions of the statute, which are asserted to be discriminations in violation of the equal protection of the laws guaranteed by that amendment. (3) It imposes a burden on interstate commerce in violation of § 8, Article I, of the Constitution of the United States.

Under the latter objection there is elaborate specification of particulars which exhibit, with the specifications under the other objections, every shade of meaning, purpose or effect that ingenuity can ascribe to the statute—indeed, every provision of the statute is reviewed and charged with some form of illegality. However, the attacks may be condensed in the charge that the statute is a violation of the prohibitions of the Fourteenth Amend-

ment of state action because of its restrictions or prohibitions of a lawful business; and a violation of the commerce clause of the Constitution because the designated securities are articles of commerce and as such entitled to unmolested transportation between the States, and that the statute is a direct burden upon them in many cases, prohibitive in others—with the addition that the statute delegates legislative power to the commission created by it, inflicts cruel and unusual punishments and imposes penalties whose object is to deter from a test of its validity; and inflicts cruel and unusual punishments in violation of the constitution of Michigan.

It is also alleged that in a suit entitled *Alabama & N. O. Transportation Co.* v. *Doyle*, in the District Court for the Eastern District of Michigan, the statute, of which the statute under review is an amendment, was declared unconstitutional and void, the opinion in which case is reported in 210 Fed. Rep. 173, and that the statute there passed upon is similar in all illegal particulars to the present statute. A remedy in equity is asserted because of alleged irreparable injury and on account of the penalties imposed, and an injunction is prayed against the enforcement of the act.

At the same time that the bill outlined above was filed another bill was filed by the Weis Fibre Container Corporation, a corporation of South Dakota, whose purpose is to manufacture, buy and sell paper or fibre containers and similar products. It is not an investment company but a manufacturing company. Its securities are not supervised or regulated by any public service board or commission and the proceeds from the sale of its stocks and securities are employed in the prosecution of its business and are not otherwise invested. The corporation is duly authorized to do business in Michigan; its stock is valuable, and it has offered it for sale in Michigan directly and through agents and employees; and it is alleged that the

representations made in regard thereto are true. It has solicited various persons in Michigan to offer its stock for sale and they have informed it that its stocks cannot be sold in Michigan unless full compliance is made with the statute.

The bill attacks the statute for the illegalities detailed in the other bill and, considering that the only remedy is in equity, prays an injunction against the enforcement of the act.

A restraining order was issued entitled in both cases. Subsequently, on September 16, 1915, a partnership, organized and existing under the laws of the State of Ohio, having the name of Otis & Company and composed of citizens of Colorado and Ohio, filed a petition in intervention.

That company is a dealer in bonds and other securities in Michigan and such bonds and securities are of the kind which the statute of the State regulates. It also sends agents into the State to solicit orders for such securities and transmits orders to its offices in Cleveland, Ohio.

It asserts identity of situation with the complainants in the other bills and adopts their charges against the statute and prays to be made a party complainant to the cause and for the benefit of the restraining order issued therein and for such other relief as the court may deem meet.

A demurrer was filed to the bills and a motion made for injunction. The company was given the benefit of the restraining order and a like benefit was given to all others who might petition to intervene, the restraining order to continue until the disposition of the motion which had been made for injunction. The injunction was subsequently granted (228 Fed. Rep. 805) and to review it this appeal is prosecuted.

There was a partnership under the name of Remick, Hodges & Company, Remick and Hodges being residents of New York and March a resident of New Jersey, having their office at the City of New York and engaged in buying

and selling stocks, bonds and other securities. Their business is known as investment banking and is carried on in New York and by their agents there and elsewhere and by mail with various corporations, associations and persons throughout the United States and in the State of Michigan. They own many of such securities which they have offered and are offering for sale and desire to continue to offer to their customers in the State of Michigan. They have no place of business in the State and are not at the present time sending agents into the State but are endeavoring to sell securities there; but the volume of such business is not sufficient to justify them to attempt to comply with the statute of the State and the statute, if enforced against them, will have the effect of preventing them from making any further offers in the State and from attempting to establish or develop any business therein, and they are excluded thereby from interstate commerce in such securities which they have heretofore enjoyed.

They allege themselves to be in like situation with complainants and adopt the allegations of complainants' bills, and especially complain of the penalties which may be enforced against them and their agents and pray to come into the suit as parties.

The causes were subsequently consolidated by a *nunc pro tunc* order.

The injunctions restrained the defendants from enforcing the act and from beginning or instituting any action, civil or criminal, against complainants "based upon or pursuant to such act."

Mr. Grant Fellows, Attorney General of the State of Michigan, for appellants.

Mr. George W. Wickersham and *Mr. Robert R. Reed*, with whom *Mr. Charles K. Allen* was on the briefs, for

appellees other than the Weis Fibre Container Corporation *et al.:*

One who "in the course of continued or successive transactions of a similar nature" offers or sells stocks, bonds or other securities owned by him, cannot be prohibited from continuing such "business" except under executive license, subject to revocation. In its every act and aspect, the business represents simply a varying number of transactions, each of which is an individual transaction and a matter of individual right. This business, and the issuing of stocks and bonds by corporations, is no more "affected by a public interest" than the business of buying and selling groceries. *Alabama & N. O. Transportation Co.* v. *Doyle*, 210 Fed. Rep. 173, 179. The professed aim of "blue-sky" legislation is to eliminate the "get-rich-quick" fakirs. The present act by its terms is directed against the great normal business and the bulk of individual transactions involving the sale and re-sale of outstanding securities amounting to billions of dollars in amount. No effort whatever has been made to confine its operation to securities involving elements suggestive of fraud and danger. It includes the "get-rich-quick" promoter in the same way that an act directed against the purchase and sale of any wearing apparel would include the street peddler in paper collars.

There has nowhere at any time been any suggestion of any wide-spread fraud in the sale or distribution of so-called investment securities. There are in fact many businesses where fraud is supposed to be more prevalent, including as instances horse trading and the automobile business. In practically every contractual transaction fraud is possible, and its prevention a proper subject for legislative action. If, upon a legislative assumption of the prevalence of fraud in any general business (as distinguished from a limited or special method of doing business) the entire business and the right to carry it on may

be made the subject of discretionary executive license, then no business can be judicially protected from the assertion of this power.

So far as we have been able to discover, no case has ever reached this court where the power of executive license was asserted except against a business clearly subject to the power of prohibition. Many such cases have, however, been before the state courts and the acts held unconstitutional. *People* v. *Berrien*, 124 Michigan, 664, 666; *People* v. *Warden*, 157 N. Y. 116, 123; *People* v. *Jenkins*, 202 N. Y. 53, 57; *Chaddock* v. *Day*, 75 Michigan, 527; *Lochner* v. *New York*, 198 U. S. 45, 63; *Bessette* v. *People*, 193 Illinois, 334.

In a special sense "police power" relates only to "great public needs," represented by "public peace, health, morals and safety." The term has also been more broadly used as synonymous with governmental power. Its use in the different classes of cases by no means implies that legislation to promote the public convenience may authorize the executive to seize the person or property of the individual in the same way as is permitted to legislation relating to public health; nor, that legislation to prevent fraud in individual transactions of purchase and sale may take the form of subjecting the right to engage in such transactions to discretionary executive license. In *Powell* v. *Pennsylvania*, 127 U. S. 678, the act was rested primarily on the protection of the public health. See also *Plumley* v. *Massachusetts*, 155 U. S. 461. *Rast* v. *Van Deman*, 240 U. S. 342, dealt with a prohibition of a particular and novel method of doing business, conceivably pregnant with a special danger to the public. In the present case we have a prohibition of an entire business consisting primarily of a succession of normal individual transactions. The right is asserted, not to prohibit specific methods of carrying on this business nor of requiring specific safeguards against fraud, but of prohibiting the

whole business, unless in the first instance the right to engage in it is granted by an administrative officer or board upon its determination of the essentially administrative question as to the character of the individual.

Unless we start with the proposition that the right to sell securities owned by individuals as a business is not an inherent right, it is difficult to conceive of any other principle upon which such power may be upheld. The determination as to the character of the individual must be essentially an individual determination of the particular officer or board. It applies not alone against local dealers known in the community, but against dealers of other States and remote cities. Once such a jurisdiction is held to be legally vested in an administrative officer, its exercise becomes potentially arbitrary beyond the power of real protection in the courts—a power of complete control over a business which is essentially individual and competitive. Such a power once asserted and exercised is bound to destroy the normal interstate business in the sale of securities.

Leaving aside some of the smaller and exceptional classes of business and local nuisances subject to municipal regulation, and dealing with the important businesses which have been held subject to discretionary administrative control, such as the railroads, banks, insurance, and liquor business, it is, we believe, correct to say that they are subject to complete power of prohibition against the individual; that they may be confined to corporations; and that they may be taken over and operated by the State. Each is susceptible to administrative control, and if necessary of complete ownership and operation by the State.

The business of dealing in the stocks and bonds of corporations is not within the principle laid down in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, and the cases upon which it was decided. *Munn* v. *Illinois*, 94

U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *People* v. *Budd*, 117 N. Y. 1, 27. The facts submitted in the present case show that there is no mature universal sense of the people regarding the regulation of the sales of stocks and bonds. The legislation flared up suddenly under popular agitation and has died down as rapidly. An equally widespread clamor easily might be cultivated regarding the management of department stores, or of any of the other manifold activities of business life which the Constitution and free institutions protect from the meddlesome interference of governmental bureaucracy. See *American Surety Co.* v. *Shallenberger*, 183 Fed. Rep. 636, 639; *German Alliance Insurance Co.* v. *Barnes*, 189 Fed. Rep. 769, 778; *German Alliance Insurance Co.* v. *Hale*, 219 U. S. 307.

The prohibition against making a particular offering or sale except upon a "certificate of authority" from a state commission is invalid. Even though a fraudulent intent cannot justly be ascribed to the promoter, yet if in the opinion of the commission he has deceived himself and is deceiving others as to the merits and prospects of his scheme, which is in its opinion unsafe, then it would in its opinion "work a fraud on the purchaser," deceive him and cause him loss. This deception and this loss, though unintended, the act plans to prevent. This is the crux of the act. The purpose is to protect a minority of "investors," looking for vast gains, against a danger existing in a small minority of transactions. It prohibits a hundred transactions, because, one of them may be fraudulent, and compels the ninety-nine innocent parties to get a permit and pay a fee, and to establish their honesty and the sound basis of their proposition before they can sell a share of stock. Where not completely prohibitive in the first instance, it will become so as to any normal offering of investment securities the moment the commission exercises its uncontrolled discretion of conducting an ex-

tended investigation of the property and business at the expense of the applicant.

Dealing with the substance, we have a delegation of complete power, including the legislative and the judicial. The thing prohibited is not fraud. It is the transaction. It is made a matter of license, instead of a matter of right without a license. A whole field of ordinary legislation is abandoned to the actual government and control of an administrative commission. This field is the prevention of fraud or improvidence in the sale or purchase of securities.

This deprives the person both of liberty and property without due process of law. It is not within the police power. *Chicago* v. *Netcher*, 183 Illinois, 104, 110; *State* v. *Indiana Oil Co.*, 120 Indiana, 575, 583; *People* v. *Jenkins*, 202 N. Y. 53, 57. The case is not like the case of banks, which invite the savings of whole communities and perform quasi-public service. The investments are essentially individual, and the fraud, if practiced, is individual. The losses sustained by fraud, as distinguished from losses due to wide-spread depressions and panics, are individual. The evil in its essence is simply an important one of the many individual wrongs which should be the subject of effective remedial legislation. See *People* v. *Vandell*, 146 N. Y. Supp. 992, 994.

Over quasi-public businesses and matters of public right, the tendency of modern decisions is to re-assert, rather than to create, the full power necessary to their effective control. There are also, of course, other subjects of prohibition and administrative control, distinct from any business, such as the control over the use of streets and public places, and the far-reaching control necessary at times for the protection of the public health, peace and safety, to which may be added the control over foreign commerce and over aliens which has been vested in the President, and the control given various officials or boards

over governmental agencies, such as the post office, and governmental property, including public parks and reservations. As to each and all of these subjects, the control rests solely on the original principle of necessity on which it was first asserted, and is historically and constitutionally an administrative power, the vesting and conditions of which are subject to law, that is to legislative grant and control. Such control not being legislative in its nature, an act vesting it in an administrator is in no sense a delegation of legislative power. Upon this principle we explain *Lieberman* v. *Van De Carr*, 199 U. S. 552; *Gundling* v. *Chicago*, 177 U. S. 183; *Engel* v. *O'Malley*, 219 U. S. 128; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *Locke's Appeal*, 72 Pa. St. 491; *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Grimaud*, 220 U. S. 506; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Fong Yue Ting* v. *United States*, 149 U. S. 698, and like cases, as distinguished from *Yick Wo* v. *Hopkins*, 118 U. S. 370.

In all these cases, though we think and speak of a delegation of legislative power, it is a vesting of administrative power not within either the letter or spirit of the constitutional rule of prohibition against the delegation of such power. See also *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Ekiu* v. *United States*, 142 U. S. 65, citing *United States* v. *Jung Ah Lung*, 124 U. S. 621. This broad power cannot exist, it cannot be judicially recognized as it has been recognized, if the principle and precedents on which it rests are to be held applicable to the entire field of remedial legislation.

The so-called standard manual feature of the act is unconstitutional and void. The act is utterly unreasonable—an unnecessary and arbitrary interference with private rights, in violation of due process of law. *Gundling* v. *Chicago*, *supra*. Section 8 prohibits the sale of stock in

Michigan if upon investigation the commission disagrees with the value which has been placed upon the property by the authorities of the issuing State. This and the power given the commission to make detailed examination of investment companies' property and affairs at the expense of such company and to make an appraisal at the like expense of its properties, is utterly unreasonable, and, as applied to the normal business, potentially prohibitive.

The act impairs the freedom of commerce between the States. There would be no question on this point but for the forced construction attempted to be placed upon *Nathan* v. *Louisiana*, 8 How. 73, and *Paul* v. *Virginia*, 8 Wall. 168. So far as the latter case goes, the distinction is plain between a policy of insurance, which is a contract between the parties having nothing to do with interstate commerce, except that the parties may reside in different States, and the case of stocks and bonds as subjects of interstate sale. The former case depended on the right of a State to tax its own citizens for the prosecution of any particular business or profession within the State. It is negligible as applied to the present statute. The interstate sale of securities falls clearly within the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189. The sale of stocks and bonds when issued and offered for sale by a dealer in New York or Chicago to an investor in Michigan, represents something more than the contract of insurance dealt with in *Paul* v. *Virginia*. It is a "subject of trade and barter offered in the market as something having existence in value independent of the parties to them," that is, of the parties to the transaction of purchase and sale. "They are not commodities," but it is not necessary that a thing be a "commodity" in order to be a subject of sale or commerce. *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Darnell* v. *Indiana*, 226 U. S. 390; *Lottery Case*, 188 U. S. 321. The attempt to rely upon the inspection cases is hardly serious enough

to require an answer. Generally speaking, a defect in personal property may be discovered by inspection. A fraud in the issuance of sale of stocks cannot be so discovered. What is here attempted is investigation of all questions relating to the soundness of enterprises and values of securities. See *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59, 62; *Turner* v. *Maryland*, 107 U. S. 38; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345.

Laws like this have been condemned by fourteen federal judges in the following cases. *Alabama & N. O. Transportation Co.* v. *Doyle*, 210 Fed. Rep. 173; *Compton Co.* v. *Allen*, 216 Fed. Rep. 537; *Bracey* v. *Darst*, 218 Fed. Rep. 482; *Sioux Falls Stock Yards Co.* v. *Caldwell* (before this court), 230 Fed. Rep. 236; *Halsey & Co.* v. *Merrick* (this case), 228 Fed. Rep. 805; *Sater* v. *Hollister* (before this court), 230 Fed. Rep. 233.

Nowhere in the lower federal courts or in the supreme court of any of the States has there been any dissent by even a single judge to the principle announced in the first Michigan case, holding the act void as applied to ordinary dealers in investment securities.

Mr. Hal H. Smith filed a brief for the Weis Fibre Container Corporation *et al.*, appellees:

The regulation of the dealer and his calling is incidental to the main purpose of the act which is the regulation and prohibition, unless in compliance with the act, of the issue of stock and bonds by corporations and the making of loans in certain forms by individuals, co-partnerships and associations. The burden of the law falls somewhat upon the dealer but its heaviest load rests upon the issuer of the stocks, bonds or securities and the issuer may be any person, corporate or otherwise, engaged in any business whatever, except only the exempted classes.

The issue and sale of securities is a part of the freedom

guaranteed by the Fourteenth Amendment to the Federal Constitution and by the constitution of Michigan. It is in effect the making of contracts "proper, necessary and essential" to the pursuit of lawful livelihoods or avocations. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Kuhn* v. *Detroit*, 70 Michigan, 537; *Valentine* v. *Circuit Judge*, 124 Michigan, 664.

The right to issue stock, to execute bonds and to secure their payment by the pledge of property is of no value unless the stock and bonds can thereafter be negotiated. This the law prevents except under heavy restrictions.

The law lays its burden not only upon the specific transaction and the particular investment company. By its sweeping definition of investment companies, it regulates all manner of business enterprises and all kinds of manufacturing and mercantile pursuits. *Moredock* v. *Kirby*, 118 Fed. Rep. 180; *Valentine* v. *Circuit Judge, supra.*

The purpose of the statute is not to regulate fraud, but rather to prevent financial loss. But even if it were otherwise, regulation of all business for the purpose of reaching the occasional fraud is clearly not justified. The fraud must be a necessary incident to the particular business, or the business must lend itself with peculiar ease to deception, else the business cannot be regulated—only the fraud. *Tyroler* v. *Warden*, 157 N. Y. 116.

This law subjects to the commission's authority all secured commercial paper. It regulates the issue and sale of corporate securities. To say now that all corporate business and these securities are so frequently the vehicles of fraud and lend themselves so easily to deception that their entire issue and all their sale must be regulated as this law regulates them, is to declare the very basis of modern business to be fraudulent. *Valentine* v. *Circuit Judge, supra.*

The court has power to determine for itself that no necessity exists for this statute. *People* v. *Smith*, 108 Michi-

gan, 527. We insist that its very basis is "unreasonable and purely arbitrary." *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342. Even if some law would be justified, we submit that the restrictions and burdens of this one do arbitrarily and unnecessarily interfere with constitutional rights; it absolutely suspends the issue, negotiation and sale of the securities for a period limited only by the whim of the commission. The provision of § 8 for an appraisal is another requirement so unreasonable and drastic as to be beyond the power of the State.

The requirement that all foreign investment companies must consent to the jurisdiction of all the courts of the State is another unreasonable restriction. It is settled that a corporation cannot be required so to submit itself. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205. It violates the constitutional right of nonresident individuals by depriving them of the immunity allowed to citizens of this State, since citizens of Michigan must be sued by personal service. *Moredock* v. *Kirby, supra; Caldwell* v. *Armour*, 1 Penn. (Del.) 545; see 9 Fed. Statutes Ann., p. 176.

The law cannot be defended as a licensing law. It deals with individual transactions. A new application must be made on each new security. The test of the permission is not the character of the dealer or his solvency. It is the character of the security. The dealer is not licensed. The dealer who is licensed can only sell approved securities.

Nor is it an inspection statute. *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59, and other cases.

The act is in conflict with the commerce clause; vests arbitrary power in the commission; its title covers more than one subject, and does not express the object, in violation of § 21, Article 5, of the Michigan constitution; it is class legislation; delegates legislative authority; and

attempts to confer judicial powers, in violation of the Michigan constitution.

Mr. George Cosson, Attorney General of the State of Iowa, and *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The statute of Michigan is the same as the statutes of South Dakota and Ohio, and our reply to the attacks made upon it might be rested upon our discussion of those statutes.

But in the present case, as we have said elsewhere, the arguments, while fundamentally the same, are in some respects more circumstantial. All the supposed consequences of the law are dilated upon—wherein, as it is contended, it meddles with or burdens a business asserted to be legitimate, wherein it prohibits or gives power to an executive officer to arbitrarily prohibit such business, and wherein it confuses legislative and executive powers, and in these ways and other ways, as it is further contended, transgresses the Constitution of the United States. Many cases are cited to support the contentions and publicists are avouched to the same end. In our discussion we cannot be as elaborate in details as counsel, nor is it necessary. There are certain outside propositions upon which all others may be regarded as dependent. These propositions were considered in the other cases and we need now only supplement what was there said.

The appellants justify the law by the police power of the State and its comprehensive reach. Replying, appellees urge against it the limitations of the Fourteenth Amend-

ment and the national supremacy over interstate commerce; and applying the Fourteenth Amendment, assert in many ways (we select one and upon it the changes are rung) that the issue of the securities "is in effect the making of contracts 'proper and necessary and essential' to the pursuit of lawful livelihoods or avocations," and cannot be "made the subject of discretionary executive license," controlling thereby individual transactions.

The assertion encounters immediately many cases in which laws have been sustained limiting the making of contracts and regulating business through executive agencies and necessarily controlling individual transactions. Indeed, there are too many for even marginal citation. They, however, are attempted to be distinguished or restricted. It is said by counsel that they "deal with administrative control over matters of public right or public grant or existing at public sufferance." And it is admitted that "the Legislature may deal drastically with many matters of private right, to prevent or redress individual wrongs." It is further admitted that "drastic remedies may be prescribed *by law* [italics ours] for evils deemed by the Legislature to require them." Excluding the proposition so expressed from application to the Michigan law, it is insisted that the business to which it applies "neither requires nor justifies, nor is susceptible of, administrative or executive control for the purpose of preventing a wrong or injury by one individual to another." Of course, the implication, if not the direct assertion, is that the business of dealing in securities has not that character. Neither the principle nor the assertion is very tangible. The first incidence of any evil from a business or conduct is upon some individual and through the individual (let us say individuals, for necessarily there are more than one) upon the community, nor can it be affected in any other way. Besides, it is for the State to judge in such circumstances and the judgment and its

execution would have to be palpably arbitrary to justify the interference of the courts. Counsel, indeed, frankly concedes the evil of "get-rich-quick" schemes and quotes the banking commissioner of the State of Kansas for the statement that the "Blue Sky" law of that State had saved the people of the State $6,000,000 since its enactment and that between 1400 and 1500 companies had been investigated by the department and less than 400 of the number granted permits to sell securities in the State. Counsel also quotes the confidence of the commissioner in the efficacy of the law and that it will "eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised."

Against this statement, however, counsel cites the view expressed by the British Board of Trade of the inexpediency of an official investigation "into the soundness, good faith, and prospects" of companies. Upon this difference in views we are not called upon to express an opinion for, as we have said, the judgment is for the State to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the State has determined that the business of dealing in securities shall have administrative supervision, and 26 States have expressed like judgments.

Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a State and its expression in laws must vary with circumstances. And this capacity for growth and adaptation we said, through Mr. Justice

Matthews, in *Hurtado* v. *California*, 110 U. S. 516, 530, is the "peculiar boast and excellence of the common law." It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in *Muller* v. *Oregon*, 208 U. S. 412, 420, that "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action." This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples to guide us. So guided and so informed, we think the statute under review is within the power of the State. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the State by such considerations would make it impotent to discharge its function. It costs something to be governed.

But counsel say that the conditions imposed either are not adequate to such purpose or transcend what is necessary for it. Indeed, it is asserted that the statute has not that purpose, "but rather to prevent financial loss." The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from § 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared

purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character.

It is, however, said that, assuming the statute have such purpose, the fraud referred to is not a proper object for the police power, and it is asked, "Can the occasional fraud, that fraud which arises in the individual transaction, justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business, a fraud which the business itself, from its character and the manner in which it is generally conducted, invites and encourages?" And, quoting from *People ex rel. Tyroler* v. *Warden*, 157 N. Y. 116, 123, "It is a novel legislation indeed that attempts to take away from all the people the right to conduct a business because there are wrongdoers in it." To the latter we say the right to do business is not taken away; the other we have already answered and need only add that we cannot upon such considerations limit the power of the State. The State must adapt its legislation to evils as they appear and is not helpless because of their forms.

Engel v. *O'Malley*, 219 U. S. 128, was not decided because fraud was incidental to the business of banking by individuals or partnerships but because fraud could be practiced in it and that hence it could be licensed. Nor was it decided in *Allen* v. *Riley*, 203 U. S. 347, that the transfer of patent rights was of itself illegal or that any particular transfer would be deceptive, but that some transfers might be; and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid. Nor did we hesitate to hold valid the regulation of the business of employment agencies. It was a lawful business and would not in instances be injuriously conducted; but in instances it might be, and because it might be, with injurious consequences, its regulation was provided. This court sus-

tained the regulation and the condition that it was to be enforced according to the legal discretion of a commissioner. *Brazee* v. *Michigan*, 241 U. S. 340. See also *Brodnax* v. *Missouri*, 219 U. S. 285. Other cases might be cited of similar import.

It may be that there are better ways to meet the evils at which the statute is directed and counsel have felt it incumbent upon them to suggest a better way. We can only reply that it is not our function to decide between measures and upon a comparison of their utility and adequacy determine their legality.

The contentions upon the discriminations of the statute we rest upon the comment made on like contentions in the other cases. A special emphasis, however, is put by appellees upon the adoption by the commission of "so-called 'standard manuals of investment.'" The adoption of these manuals, it is said, is justified by the commission under § 3 which enumerates the securities that are exempt from the law, among others, "(h) securities which are listed in any standard manual of information approved by said commission." The provision is attacked as "'the Michigan idea' of providing an easy way out of the act at all times." And further, "It is not so much an exemption of existing standard securities as a working exemption available for new offerings to be listed as issued." And again, "It is to be a permanent means of exempting new securities from the act." Even this, it is asserted, is not all of the power that is given for discrimination, for it is pointed out that the commission may call for additional information than that contained in the manuals and may, pending the filing of the information, suspend the sale of the securities and may also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice, if the commission shall find that the sale of such securities would work a fraud upon the purchasers thereof.

The exemption and the provision are declared to be unconstitutional and it seems to be intimated that in the flexibility of what is considered their subterfuge a vicious character is not only given to the act but constituted its inducement, and therefore brings the act down with it, for without it, it is insisted, the statute would not have been enacted. We cannot agree either to the characterization of the provision or its effect. The first would attribute a sinister purpose to the legislation of which there is no indication, the second would give too much importance to a subordinate provision, one that is only ancillary or convenient to the main purpose.

The contentions based on the exemption and provision are a part of that which accuses the law of conferring arbitrary discretion upon the commission and committing to its will the existence or extinction of the business. The accusation is formidable in words but it is the same that has been made many times. It is answered by the comment and the cases cited in the opinion in the other cases. Besides, we repeat, there is a presumption against wanton action by the commission, and if there should be such disregard of duty a remedy in the courts is explicitly given, and if it were not given it would necessarily be implied.

Objection is made that the title of the act does not indicate its provisions and that the act hence violates the constitution of Michigan. The objection is untenable and does not call for particular notice.

Answer to the contention that the statute is an interference with interstate commerce we leave to our opinion in Nos. 438, 439 and 440, *ante*, 539.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS dissents.